

A N
I D E A
O F T H E

Modern Eloquence

Of the

B A R.

Together with a *Pleading* out
of every Part of *Law*.

*Written by Sir George Mackenzie of
Rosehaugh, Advocate to King Charles II.*

Translated into English.

*Pulchra enim, &, ut ita dicam, pudica oratio non est
maculosa, nec turgida; sed naturali pulchritudine
exsurgit.*

Petranius.

E D I N B U R G H,

Printed by Mr. ROBERT FREEBAIRN, and
sold at his Shop in the *Parliament-Clofs*, A. D. 1711.

DEDICATION OF THE TRANSLATION

To the Right Honourable Sir James
Mackenzie of ROYSTON Ba-
ronet, One of the Senators of the Col-
ledge of Justice and one of the Lords
Commissioners of the Justiciary.



Together with
of every
M. T. L. O. R. D.

THE Address of the follow-
ing Translation is to very
justly due to your Lordship
that I no longer relate
publish it than I have
from W. B. U. R. G. H.

Printed by M. A. O. R. T. F. R. B. A. I. R. V. A. N. D.
sold at his Shop in the Parliament-Cafe, A. D. 1711.

THE
DEDICATION
Of the Translator,

To the Right Honourable Sir James
Mackenzie of ROYSTON Ba-
ronet, One of the *Senators* of the Col-
ledge of *Justice*, and one of the Lords
Commissioners of the *Justiciary*.

MY LORD,

THE Address of the follow-
ing *Translation* is so very
justly due to your *Lordship*,
that I no sooner resolv'd to
publish it, than I had my Pa-
tron in View.

a

It

It was impossible for me to turn into *English* the *Pleadings* of my ingenious Author, without feeling my self powerfully dispos'd to take this Occasion of expressing my Esteem and Respect for one who is so nearly related to his Illustrious Family.

I shall not insist upon your *Lordships* personal Qualities; nor need I mention a *Maxim*, which is generally known and receiv'd, *That a skilful Lawyer never fails to make an able Judge.*

Instead then of addressing my self, in the ordinary Stile
of

Of the *Translator*.

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of *Dedications*, to one who makes so considerable a Figure among the Living, I shall take a distant View of that eminent deceas'd *Lawyer*, some of whose *Writings* I have attempted to translate.

Sir George Mackenzie's Character is already so well known and establish'd in the World, that it is almost needless to inculcate the Praises of one who is so universally and justly esteem'd.

Every Body allows, he was a Man of great Learning and Penetration ; that he was Master of a clear and flowing
Stile

Stile, and has imitated in his Works that beautiful Simplicity which we so much admire in the *Ancients*. He was a Person of Candor and Sincerity in all his Actions, and of indefatigable Industry and Application in Business: Insomuch that the Character of *Labeo*, the Roman Lawyer, which he takes Notice of in the *Preface* of his *Observations* on our *Acts of Parliament*, may, with a great Deal of Justice, be apply'd to himself.

That he was a Man of Wit and Ingenuity, does not only appear from the great Variety
of

of Subjects he has handled, but is also evident from the handsome Commendations which Mr. *Dryden* bestows upon him, who very frankly owns, that Sir *George* discover'd to him a great many Beauties and Delicacies in the *Classick* Authors, and was the first that made him sensible of the inimitable Turns of Poetry that are to be found in the *Ancients*. I am

My Lord,

Your Lordship's

Most obedient, and

Most humble Servant.

Robert Hepburn.

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THE P
P R E F A C E

of the *Translator.*

THE ingenious Author, in his own
Dedication, has given so full and
handsome an Account of the Nature
and Design of these Papers, that it
were impertinent to say any more on
the Head. I therefore shall forbear
giving my self the unnecessary Trouble
of recommending a Book to the Pub-
lick, whose *Author* has already gain'd
universal Applause; and only say
something in Defence of my own
Translation.

I own, an Attempt of this Nature,
should one prove so unlucky as not to
succeed, might justly be accounted a
ridi-

ridiculous Piece of Presumption.

I have often been at a Loss to think what should be the Reason why our Countrymen take so little Care to recommend themselves to the Publick by their Writings. I am confident it is not so much for want of Genius, as of a Language to express their Thoughts. We find those, who by incredible Pains and Application have render'd themselves Masters of the *Latin* Tongue, have made as considerable a Figure in the World, as any of their Contemporaries. But it is so very hard a Task to attain an absolute Command of that noble Language, that I am not surpriz'd to see People frightened from the Attempt.

'Tis true, the *Greek* and *Latin* have infinitely the Advantage of all modern Tongues; but I am sure, if we had a just Sense of the Beauties and Elegancies of the *English* Language

we

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we would be at more Pains to acquire it than at present we are.

The *English* Tongue is copious and manly, and significant; if we except a few Grammatical Errors, we may venture to affirm, that it is now arriv'd to its greatest Pitch of Perfection: So that if it is not so Universal, as the *Greek* or *Roman*, it will at least prove as lasting and durable as any Author can have the Vanity to imagine his Writings will be. And yet it is so extensive, that *Sir William Temple*, in his *Memoirs* tells us, in *King Charles II's* Time, it very much obtain'd, in *Germany*, and was mightily in Vogue at the Courts of the *Electoral* Princes. And if we may be allowed to measure the Extent and Duration of a Language by the Bravery and Success of the Nation that speaks it, what an agreeable Prospect may we conceive of it at present, when the Face of Affairs is so happily

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happily alter'd, and our Arms so much more usefully and victoriously employ'd than they were in that Prince's Reign?

The Works of Arch-bishop Tillotson, Sir William Temple, and Bishop Sprat seem to be exact Standards of the Force and Beauty, the Elegancy and Propriety of the *English* Tongue.

And the ingenious Lucubrations of Isaac Bickerstaff, who is an inimitable Master of Stile, do give him as just a Title to preserve the Language, as to correct the Vices of his Countrymen.

The easy Cadence of the Periods is what very few of the *modern* Writers observe. And yet we find the *Ancients* took all imaginable Care to please the Ear, by rendering their Languages smooth and harmonious: Cicero was fond of it to Excess; and I find it remarked as a Wonder in the Notes of an old Scholiast upon his *Pleading* against

Cæcilius

Of the *T R A N S L A T O R*. ix

Cæcilius, that one of his Periods seem'd somewhat harsh: For which, at last, the *Commentator* assigns this Reason, That in *that* Sentence he was making his *Adversary* speak. This Reflexion, (which yet to some may appear too refin'd) ought, methinks, to make us very much ashamed of our extreme Ignorance and *Rusticity* in this Matter.

I must confess, I am not very ambitious of the Name of a *Translator*. The Ingredients of that Character seem rather to be Exactness and Industry, than Wit and Invention. My only Design in this Version was to improve my Stile and Manner of writing. But when once I had got over the whole Book, I fancied the Publick would easily be inclin'd to pardon the Imperfections of my first Attempt, if I endeavour'd to put the *Pleadings* of an eminent *Scotts* Lawyer, into a more modish Dress.

T H E

THE DEDICATION

Of the AUTHOR,

To the

ADVOCATES

Of the Present Age.

Gentlemen,

THE numerous Volumes of Commentators and Expositors have already swell'd the Civil Law to too great a Bulk : We are overloaded with Decisions; and the Writers of Customs, have sufficiently distracted us by their

their voluminous Treatises; so that now there remains no new Thing for us to handle but the Pleadings of the Bar, which, as they entertain us with something that is pleasing and agreeable, like the Charms we find in the Spring and Youth; so they have all those secret and resistless Allurements, by which Riches and Ambition have so mighty an Influence on the greatest Part of Mankind. But while they appear in no other Dress, than what our native Tongue can bestow upon them, they seem to languish in a melancholy Confinement. For there is so small a Part of the World that can possibly peruse them, that there is no Manner of Encouragement for an Author to be at the Pains, which so noble an Undertaking demands; especially, since upon Account of the Inconstancy of the Language, in which they are written, they shall not be able to out-live the present Age, and therefore do not afford a sufficient Recompence

pence for all the Pains and Labour the composing of them has cost us.

Books that are written in our native Tongue, while they are yet new, are nipt by Envy in the tender Bud; and when they are grown older, and have surviv'd the Malice of our Contemporaries, our fleeting Language instantly disappears, and intirely abandons them to eternal Oblivion. So that we seem to be guilty of the same Piece of Folly and Extravagance with those who erect Monuments of weak and infirm Materials, and fondly write upon the Sand what the next Wave shall intirely wash away and deface.

Our Judges, after you have illustrated the most abstruse and difficult Points of Law, and set Matters before them in a clearer Light, write their own Decisions with Abundance of Ease: The Professors of the Civil Law write those Things they teach their Scholars, without any further Pains and Trouble than what

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they have already cost them. But we are such Fools as to neglect the Pleadings of the Bar, which we have mutually refin'd and adorn'd by all the Eloquence, Wit and Ingenuity whereof we are Masters, and compile large Commentaries and voluminous Treatises with more Pains and Industry than Success or Applause. And yet the one does not afford us so large a Return of Honour and Renown as the other: For in Pleadings, every Thing is new and profitable; and because of the Ambiguity and Variety of the Matters that occur in them, they admit of a great many different Turns of Thought and Expression; and this is the Reason why we are allow'd to debate them at the Bar: But in Commentaries and Expositions the Reader meets with no other Entertainment than rigid Subtletys and tedious Citations.

The Pleadings of the Bar are refin'd by the warm and vigorous Debates of Advocates

vocates, who employ upon these Occasi-
ons the utmost and sprightliest Efforts of
their Wit and Invention. Whereas Com-
mentarys are usually compos'd by one
single Man, whose Wit is not sharpen'd
by Opposition, nor encourag'd by the Ap-
plause of a noble Audience, and the
Bounty and Liberality of generous Clients.
These Considerations have induc'd me
to write my Pleadings in the Latin
Tongue, that just and faithful Repository
of Fame, which never loses those things
that are committed to its Care, and in-
stead of lessening the Sense of an Author,
(if he has any) elevates and exalts it.
And this I am confident is the only infal-
tible Method of transmitting to Posterity
all the ingenious and accurate Pleadings
of the eminent Lawyers among us. And
altho I may be somewhat discourag'd from
my present Design, when I consider that
after Cicero no Man durst ever attempt
it; to whom I am infinitely more inferiour

The DEDICATION

in Wit and Invention, than distant from him in Time; and who, while he delivers to us the Precepts of Eloquence, discovers himself to be so absolute and inimitable a Master of it, that he effectually frights us from Oratory at the same Time that he professes to teach it: Insomuch that he excells me more in the Force and Majesty of his Diction, than in the Skill and Command of the Latin Tongue: (for I look upon the Harangues of Seneca and Quintilian rather as painted and feign'd Representations of Pleadings than real ones) I have yet this notwithstanding made bold to enter upon this Undertaking: For I am not ignorant that our Advocates have too many Advantages, even above those of the Augustan Age, to despair utterly of Success in this laudable Attempt. We have at present the Body of the Civil Law, whose Compilers did almost all of them flourish after Cicero's Time. Our Manner of Pleading is now improv'd

improv'd by long Practice and Experience, and that manly Force, and strong and nervous Sort of Eloquence, which is proper for the Bar, is arriv'd to its Highest Pitch of Perfection. Add to this, that the great Variety of our Municipal Laws, and the infinite Number of our famous Pleadings and Decisions, afford us a new and inexhaustible Field of Topicks and Arguments, which were utterly unknown in Cicero's Age, and furnish Abundance of Matter for the sprightliest Wits. So that if we do not gain as sure and lasting a Reputation, as some of the Ancients have done before us, it ought rather to be imputed to our unaccountable Laziness and Negligence, than to the Nature of the Thing itself, and proceeds more from Want of Courage than Invention. But I am afraid, the sordid Love of Money, that weak and treacherous Monument of Fame, and the mean Consideration of Fees and Profit, takes off too ma-

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ny of us from the generous Pursuit of
Glory and Renown, while we endeavour
more to make vast Estates for our Chil-
dren, than to acquire a noble and lasting
Reputation.

It may also perhaps be objected to me,
that I attempt a Business of too refin'd and
sublime a Nature for one that lives in so
cold a Climate, where the animating Rays of
the Sun are so far remov'd from us, that they
do not sufficiently inspire us with Life, and
Vigour ; But since our Soul descends from
above, it is not to be measured by the Rules
of Geography, as if it were an unactive
Lump of Clay ; & seeing it was breath'd into
us by Almighty God, it ought to remember
its divine Original, and boldly aspire to
the noblest and sublimest Things : For,
as it needs not the Assistance of these gross
and Elementary Bodies, it has no Rea-
son to be apprehensive of any Obstacles or
Impediments it can possibly encounter
from 'em. A generous and ardent Emu-
lation

lation, which is infinitely stronger than the Heat of the Sun, animates our Souls and inspires them with Warmth and Vigour; and the sprightly and invincible Nature of it raises and elevates them to Heaven from whence they came, firing at present with an ardent Desire of Glory and Immortality a greater Number of polite and civiliz'd Nations, than in the Days of Cicero were Orators at Rome.

We live in that Kingdom, which set Bounds and Limits to the Roman Empire, by the Bravery of its Inhabitants; and to their Eloquence, by our Buchanan's, our Barclays and Blackwoods, and other famous Writers of our Nation. And if they, who liv'd in the first Dawn of Learning, and receiv'd all their Improvements in the Obscurity of the Schools made so great a Noise in the World, what may be expected from our Advocates, who are born in a happier Age, and assisted with all the Advantages that Leisure and Riches

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Riches, a liberal Education and the respectful Observance of Clients can possibly afford them? In whose Society, which is now exalted to an invidious Pitch, I am not asham'd to own that I'm only in the Number of those, who make but an ordinary Figure.

There are many who will perhaps think it somewhat inconvenient, that we are not so much Masters of the Latin as in it to express our Thoughts in an exact and agreeable Manner, and with all the Propriety and Easiness of a native Tongue: But since the Text of the Civil Law flows from the purest and most uncorrupted Fountains of the Roman Eloquence, and the Commentaries of it are written by the nicest and ablest Criticks of that Language, and illustrated from the best and choicest of the Roman Authors; Lawyers, in my Opinion, both ought and may use it more elegantly and copiously than any other Writers.

There

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There is a certain Majesty and Perspicuity in the Latin Tongue, which is not to be found in any other ; insomuch that these Things, which in other Languages have met with a very indifferent Reception, even at Home, as soon as they appear'd in the Roman Dress, have been extremely valu'd all the World over. And this ought not only to be ascrib'd to the Grandeur and Majesty of the Romans in this surviving the Ruins of their Empire ; but is also in a great Measure owing to the happy Pains and Care an Author is oblig'd to take, when he writes in Latin : For then he must endeavour to adjust all his Words and Expressions, and nicely consider the Nature of his Subject ; since he exposes himself to the Censure of all Nations and Ages of the World.

And here I may, without Vanity, instance, in our own Countrymen Craig and Buchanan, who, by writing handsomely

in that noble Language, have secur'd to themselves, to all Futurity, a lasting and immortal Reputation; whereas if the one had compos'd his History, and the other his Account of the Fewdal Law, in their native Tongue, Time would have almost already triumph'd over all their Labours, and depriv'd them of that glorious Character they so justly deserve.

And yet these Considerations so far prevail'd with me that I have confin'd my Book to as small a Compass as I could conveniently do; and therefore, lest I should too much weary my Reader, I have only made Choice of one Pleading out of every Part of Law, among those I happen'd to be engag'd in, within the Space of a Year. If these meet with a favourable Reception in the World, I shall be encourag'd to publish more; and if they do not please, I think there is more than enough of them already: For I fancy, I shall find it easier to add others than to excuse these.

But

But, as they are, Gentlemen, I submit them to you, who are the great Masters of Reason and Eloquence, and the Preservers of Equity and Justice; who are born for the Defence and Protection of Mankind; and whose eminent Learning and Prudence are mutual Ornaments to one another. To your Judgement and Censure, I willingly and humbly submit these Papers, hoping that those Persons, who are my Patrons will prove favourable Judges.

I am

Gentlemen

Your most humble Servant.

George Mackenzie

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B*Y which a Woman, that had murder'd her own Child, is accus'd before the Men of Inquest, who, in Scotland, are Judges in criminal Cases, arising from Matters of Facts; and wherein the Advocate pleads after the Manner of the Roman Orators, without adducing any Citations of the Laws or Doctors.*

DECISION.

The Pannel was condemn'd to die.

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D E-

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The Lords determin'd it in Favour of
of the Patron.

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DECISION.

The Lords found that the future and possible Heir was to be expected.

This Pleading shows the Usefulness of the Knowledge of the Civil and Fewdal Laws in Municipal Causes.

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B A R.

O F all the shining Accomplishments of a generous Mind, none has the Advantage of *Eloquence*, and few can pretend to equal it.

Princes are usually oblig'd for the Crowns they wear, rather to the Lustre of their Birth than their personal Merit. The Intrigues of States-

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ment

men, and the *Lawrels* of *Generals* are oftner measur'd by the Success that attends them than the real Qualities of the Persons themselves ; and at best they too much depend upon Chance and Fortune to deserve properly to be call'd our own. But *Orators* derive all their Glory and Reputation from themselves alone, and are not indebted for any Part of it to Fortune : Other Conquerors make themselves only Masters of the Bodies of Men, but they vanquish their Minds : Those carry Ruine and Misery along with their Conquests, but *Orators* most agreeably entertain these Persons whom they captivate by the Charms of their *Eloquence*.

Of all those who make *Oratory* their principal Study, *Advocates*, in my Opinion, may justly pretend to the noblest Character : For they excell *Courtiers* in Wit and Invention; *Philosophers*

Modern Eloquence of the Bar. 3

losophers in Variety of Topicks and Arguments; and *Preachers* in Presence of Mind. *Courtiers* indeed make it their Business to humour the Inclinations of Princes by their admirable Skill and Address, and endeavour to insinuate themselves into the Affection of their Sovereign by their agreeable Behaviour, and their easy and polite Way of Talking. *Philosophers* are always confirming the same old *Positions* by Arguments that are too common and threed-bare: They never affirm or maintain any thing that is new, and unexpected, and neither can nor ought to prove several Points, which do yet, in their own Nature, stand very much in need of further Illustration. *Preachers*, secur'd from all Answer and Interruption, do calmly deliver the Sermons they have studied at their own Leisure, without any Noise or Disturbance: We go to Church, po-

ness'd with a firm Belief of their Doctrine before we hear it, and are rather perswaded by the Truth of the Subject than the *Eloquence* of the *Preacher*. But *Advocates* daily discourse upon an infinite Variety of Subjects, and always invent new Arguments to confirm what they advance. They answer *Extempore* to the studied Harangues of their Opposers; and altho they are involved in a vast Multiplicity of Affairs, they do yet handle every one of them as accurately as if that alone employed all their Thoughts; & so insensibly gain Ground upon each other by Turns, that he who speaks last is always sure to perswade the *Audience* that he only is in the Right.

Poetry is intirely made up of Flowers and Graces, and imitates the Nature of *Flowers* in this, that it is neither lasting nor profitable: For after it has for some Time agreeably flattered

Modern Eloquence *of the Bar.* §

red our Humour with it's fleeting and inconstant Pleasures, it suddenly disappears, and vanishes into that empty Nothing from whence it came; neither procuring Riches to the *Poet*, nor affording Protection to his Friends.

What can be imagin'd more desirable and more worthy of a great and generous Mind, than to deliver innocent Persons from the devouring Jaws of their *Accusers*, and to free them from their insolent and haughty Oppressors; to instruct the Judges, and set Matters before them in a clearer Light; to charm the *Auditors*; to extricate and disengage the Truth from all those *Clouds* of Error and Darkness, and *Ambiguity* in which it is involv'd; to strike Terror into the *Guilty*, and bring those miserable Wretches to the exemplary Punishments their Crimes do deserve?

These are the Persons who please
and

and entertain us at the same Time, that we are amaz'd and terrified with the Thunder of their Voice. What Man can forbear trembling and turning pale, when he hears them plead against him with so much Force and Vigour? None of the *Auditors* any longer remains Master of his own Passions; and 'tis impossible for them to command these sudden Transports and Emotions of their Souls: No man is himself, but intirely depends on the *Breath* of the *Orator*, and hangs upon his *Lips*. He gently leads his *Audience* whithersoever he pleases, and, by the *Weight* of his *Eloquence*, inclines the *Ballance* of *Justice* to his own Side. Add to this, that *Lawyers* have the noblest Subjects to exercise their Wit and Invention while they are employed in the accurate Search and vigorous Pursuit of Truth through all the retir'd and hidden Paths and the winding

Modern Eloquence of the Bar. 7

winding *Mazes* and *Labyrinths*, in which it is involv'd ; while they draw Topicks and Arguments from the inexhaustible Fountain of their own Invention, and form them by their Judgement, and give them a handsome Turn ; comparing Things of the same Nature together, and *Contraries* with their *Opposites*.

The Dignity of their Profession appears from the handsome Commendations, which the Emperors *Leo* and *Anthemius* are pleas'd to bestow upon them.

' *Advocates* (say they) (*a*) who determine the doubtful and uncertain
' *Fates* of *Causes*, and by their bold
' and vigorous *Defences* maintain and
' support both publick and private
' Affairs, when they are in a bad and
' infirm Condition ; do as effectually
' provide for the Security of Mankind,
as

(a) L. 14. C. de Advocat. divers. Jud.

‘ as if they sav’d their Country and
‘ Parents by exposing their Lives for
‘ them in the Field against their Ene-
‘ mies. For we do not look upon
‘ those, as the only Persons that fight
‘ under our Conduct, who defend us
‘ with their Swords and Shields ;
‘ since *Advocates* also fight in our Be-
‘ half, who, reposing all their Confi-
‘ dence in the invincible Power and
‘ Force of their *Eloquence* do vigo-
‘ rously and gloriously defend the
‘ Hopes, and Life and Posterity of
‘ those that are oppressed.

The *Schoolmen* imagine, the *Law* is
not supported by Arguments but Au-
thorities ; and consequently does not
admit of any fine Reasoning at all:
But they are extreamly mistaken ; for
there is no Science in the World that
allows of more different Ways of ar-
guing about it.

In *Theology* all that we know of
God

Modern Eloquence of the Bar. 9

God is so far short of that infinite Being that it is dangerous warmly to debate about these Matters: For *God Almighty* has, by his inexpressible Brightness and Glory, so dazled the Eyes of weak and ignorant Mortals, that tho he himself beholds every thing, yet it is impossible for us to discover any Part of his Nature or Perfections.

Naturalists and *Physicians* can agree in nothing, but are perpetually subverting and denying each others Principles, and forc'd to rely upon contrary Experiments and uncertain Conjectures. *Mathematicians* do not dispute but demonstrate. And as for *Logick* and *Metaphysics*, the greatest Part of those things which are handled in them are trifling and impertinent; and so useless and unnecessary to humane Life, that no Person in his Right Senses will think them

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worth

worth his Pains : But the *Lawyer* derives his Principles from the purest Fountains of Sense and Reason, which are of excellent Use and Advantage to Mankind, and extreamly necessary to humane Life. He draws his Arguments from long Practice and Experience, and debates what is agreeable to Right Reason, convenient for Mankind, and most directly tends to the Advantage of the Publick. He considers the *Constitutions* of other Nations, and disposes the *Laws* of his own Country into such an Order as is most convenient for his Purpose. And certainly since the twenty four Letters of the *Alphabet* produce so vast a Multitude of Words, what an infinite Variety may we expect from so great a Number of *Laws*, *Decisions* and *Circumstances*, and their different Aspect and Relation to each other. For altho there are a great many things
esta

Modern Eloquence of the Bar. 11

establish'd in *Law*, and enacted by *positive Statutes*; yet no *Laws* or *Constitutions* can regulate and comprehend all possible and imaginable Cases: And therefore both the *Judge* and the *Advocate* are obliged to extend them to those which are of the same Kind and Nature.

The *Professors* of other Sciences do hardly engage in Debates once in a Month; but *Advocates* daily and almost every Hour handle new and unheard of Arguments: Nor do they make their Harangues in private and obscure Schools, and amidst a Company of Boys and Children, but are surrounded in the *Courts* of *Justice* with Persons of the highest Quality, and admir'd and applauded by a noble *Audience*: Nor are they encourag'd by an empty Praise, but liberally rewarded for their Pains; and by their warm and vigorous Debates they mu-

An Idea of the
tually sharpen and refine their Wits.

*A noble Emulation does them fire,
And adds aspiring Wings to their Desire.*

I am not ignorant that there are some *Lawyers* who affirm that *Eloquence* ought to be banish'd the *Courts of Justice*, because, by its bewitching Charms, it byasses and corrupts the *Bench*, consumes a great deal of Time, which might be more profitably employ'd and takes off the Minds of *Advocates* from a serious and solid Contemplation of *Law* and *Justice*, to a trifling and impertinent Nicety about their Words and Expressions.

'Tis true indeed in the *Roman Pleadings*, it was impossible for the *Lawyers* without the Assistance of *Oratory* to manage the Populace, and prevail with the rude and ignorant Multitude, whose Passions they were oblig'd to raise

Modern Eloquence of *the* Bar. 13

raise and inflame, in Order to effect their Designs. Besides, at that Time, there were no fixed and establish'd *Laws*, by which all Causes and Controversies between contending *Parties* might be exactly determin'd : But all their Topicks and Arguments were taken from material *Equity* and *Justice*, without any Consideration of *positive Law* ; as any Man will easily perceive from the Strain of *Cicero's* Oration. But now the Face of Affairs is entirely alter'd ; for by our *Laws* and *Decisions*, good *Judges* are directed, and the bad restrain'd ; and they are ordinary Persons, so advanc'd in Years, that they cannot easily be impos'd upon with painted and glittering Harangues.

To this I answer, that I do not approve of an empty and insignificant *Eloquence* ; nor of that which is forc'd and unnatural : When the *Orator* abandons

does his Arguments, and loses himself among the *Flowers* and Ornaments of Speech ; but it ought to be pure and cleanly, in which *Rhetorick* only furnishes the *Law* a gentle and easy Dress ; and just Sense is delivered in Words that are proper and significant, and apt to convince the *Auditory*. An *Eloquence* which is so far from rendering the Argument more confus'd and perplexed, that it rather tends to illustrate, and set it in a truer Light ; in which an easy and fluent *Elocution* does happily embrace the Thoughts it expresses, and carries them forward in a gentle Course to their intended Purpose ; so that the *Advocate* is neither at a Loss how to express himself, nor the *Judges* perplex'd with the Obscurity of his Discourse. The true *Sublime* never swells beyond its proper Bounds, but rises with a natural Beauty, being great with-

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without Excess and handsome without Affectation. Who can deny that even in the most grave and serious Subjects, proper and well chosen *Epithets* contain Arguments in themselves, and that the most powerful Considerations are animated by them with a stronger Force? And altho I am no great Admirer of those who mind nothing but Words, there are yet a great many Cases in which the Truth depends not upon *Laws*, and the Authority of the *Doctors*, but may be gather'd from Circumstances *Presumptions*, and other probable Conjectures, in the managing whereof the *Orator*, exempted from the Rigour and Severity of the *Laws*, may use a florid and copious *Eloquence*, with a manly Freedom; provided he does not indulge himself too great a Licence. And then in arbitrary and uncertain Cases, where the truth hangs doubtfully

fully, and is equally *ballanc'd* on both Sides, the resistless Power and *Weight* of *Eloquence* is always sure to determine the Matter. Besides, a man may also be allow'd to speak eloquently and copiously in those Cases, which were never debated before, and have not yet *suffer'd* a *Decision*; as also in *Political* and *Criminal Causes*, where a graceful way of speaking is extremely necessary, in Order to raise the *Passions*: And in fine, *Eloquence* is always agreeable, provided it be chaste and easy. For as we would wish our *Mistress* to be lovely and beautiful as well as rich and virtuous; and *Cæsar* accounted it the Part of a good Soldier to take Care of his Armour that it might always appear bright and unfullied, so we cannot chuse but be pleased with a handsome Discourse, and the Majesty of it is always sure to strike Terror into the *Audience*. Besides

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fides that *Eloquence* inclines the *Judges* to be favourable to the *Orator*, and so agreeably engages their Attention that it is impossible for any Part of his Discourse to escape their Notice. We retain what pleases us, and those things that delight and entertain us make a lasting Impression upon our Minds. And since we are at so much Pains to provide beautiful Ornaments for the Decoration of our selves and our Houses, not for Necessity but Pleasure ; why ought we not rather to indulge our *Genius*, and take some Care to adorn our Soul, that is the nobler Part, to which we owe a great deal more than to our Eyes and Senses that are subject to its Command, and whose Perspicacity requires a greater Accuracy and Exactness at our Hands, despising that which is vulgar, condemning what is mean,

and undervaluing those things that are common and ordinary.

If we take a View of this glorious Fabrick of the World, we cannot but perceive a great many Things created for Ornament and Pleasure, and if we consider the sacred Writ, we shall there meet with many surprizing Strokes of a sublime and lofty *Eloquence*; the Stile of it being adorn'd with a great Variety of *Metaphors*, *Exclamations*, *Hyperboles*, and all the other Graces and Ornaments of Speech. Nor can there possibly be imagin'd a handsomer and sublimer Discourse than that which God himself makes unto *Job*, which by the Beauty and Majesty of its *Diction*, at the same Time transports us with Pleasure, and strikes us with Terror and Amazement. If we impartially consult our own Breasts, we must needs confess that we are taken with this

this Art ; and therefore if we can be so happy as to render our selves Masters of it, we need not despair of captivating others, the same Way. And then the more suspected it is by *Judges*, the greater Care and Application ought *Advocates* to use in Order to attain it. For this Suspicion arises from an inward Sense of the Power of *Eloquence*, and a frequent Experience of its resistless Influence, and invincible Force ; by the Assistance whereof the *Lawyer* is sure to prevail, and without which it is impossible for him to acquit himself handsomely on any Occasion.

But an Advocate must beware of employing his *Eloquence* about mean and trifling Subjects ; for by this means, instead of exalting his Argument, he will only abase his Art. Nor ought he to affect too much Gaiety and Sprightliness of Humour in

grave and serious Matters ; Since this would be as ridiculous as if a *Judge* or *Clergy-man* should wear an effeminate or *Mimical* Habit, tho it were never so fine and sumptuous.

Every Science has a Style peculiar to it self : That of the *Legislators* is short and sententious ; whereas the *Orators* is copious and fluent. In *Moral Philosophy*, there is frequent Occasion for Sentences and Reflections, that so they may make the deeper Impression upon the Minds of the *Auditors*, and be the easier convey'd and transmitted to Posterity : But there is very little Use for them at the Bar. For it is not so much the part of an *Orator* to teach as to persuade. But if it happens that they must of Necessity be us'd, we ought to beware lest they be any way forc'd and remote from the Subject, and brought from too great a Distance ; for this would
argue

argue a ridiculous Affectation. Nor should they be us'd by young Persons; because this has in it too much of Presumption and Arrogance. And then there ought not to be too many of them, nor too near each other: For since they are only made use of to give a new and additional Beauty to a Discourse, we should maintain the same Order and *Decorum* in them that is observ'd in the *Patches*, that adorn the Faces of beautiful Women, which then only please us, when they are few, and at a just and proper Distance from one another.

‘ We must take Care, says *Petronius*, lest these Sentences appear too much without the Body of our Discourse, but like the sumptuous Ornaments of a well made Garment, they should be handsomely interwoven, and of a Piece with the rest.

But

But there is sometimes as great Affectation in utterly despising all Sorts of Ornaments, as in the too gaudy Use of them ; and as *Quintilian* excellently observes, “ There are
 ‘ some Persons so affraid of aspiring
 ‘ too high and so apprehensive of fall-
 ‘ ing, that they lye always low and
 ‘ grovelling upon the Ground.

And therefore we must sometimes bear with unusual Transports of the Soul, wherein *Nature*, breaking loose from all Manner of Restraint, takes Pleasure to show us how far she transcends all the *Art* in the World.

The *Definition* which *Cato* of old gave of an *Orator* was that an *Orator* is an honest man who has *Eloquence* to express his Thoughts. But now that the Body [of the *Law* is increas’d to so great a Bulk, we must add that an *Orator* is an honest and *learned Man*, who is Master of a handsome Way
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of speaking. It is absolutely necessary he be an *Honest Man*; for if a Speaker does not pass for a Person of Probity and Virtue, People will be apt to disbelieve every thing he says. And since the main End of *Eloquence* is to *persuade*, it is impossible for one to prevail upon his *Audience* whose Character and Reputation is so small that ~~that~~ he does not deserve to be believed. Now with what Face or Confidence can a Man go about to recommend Honesty and Virue to others, when he is notoriously guilty of wicked and unjust Actions himself? And therefore an *Orator* must take particular Care lest he advances any thing, which may lessen his Character in the Opinion of grave and judicious Men, either by positively affirming what seems incredible, or by propounding any thing that is neither true, nor has so much as an Air of Pro-

Probability. He must also beware of sullyng his Reputation by keeping too much Company with vicious Persons, or too frequently and warmly undertaking their Defence. *God Almighty* who neither proposes to us Virtue nor Religion without a Reward does usually make the Success of our Undertakings, in some Sort, answer the Sincerity and Uprightness of our Intentions; and the World is as apt to pardon the Mistakes and Errors of *Honest Men*, as to be affraid of the Cunning and Treachery of the bad, even when they are really doing what is just and virtuous. We ought to have deep and lasting Impressions of *Justice* fixed in our Minds; and should form an awful and venerable *Idea* of it. We may acquire Reputation without any great Pains, or Trouble; and Riches only as an accidental Acquisition, but *Justice* is necessarily

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ly to be pursu'd upon its own Account, with our warmest Endeavours, and our closest and most vigorous Application.

Without an exact Knowledge of the *Law*, an *Advocate* is like a Souldier that wants his Arms, and his Harangues are nothing but an empty Sound; and as the most learned Man in the World cannot without this popular Sort of *Eloquence*, so neither can the most eloquent without this polite Learning make a handsome Figure in the *Courts of Justice*. He ought to make *Humanity* very much his Study; from whence he will exactly learn the History of the *Law*, and be inform'd of the Manners and Customs of the ancient *Romans*. Let him frequently peruse the *Body of the Civil Law*, which is the best and purest Fountain of *Justice* and *Eloquence*; and let him prefer the *Commentaries* that are written on that

Subject and the *Interpreters* of it to all others, neither over-loading his Memory with the voluminous Authors of Treatises and *Expositions*, nor distracting his Judgement by the tedious Writers of *Controversies* and *Customs*. For sound Reason, provided it is not weaken'd by too much Speculation, or wearied and exhausted with too much Study, will easily make up and supply what is wanting in reading. While others peruse *Histories*, let a *Lawyer* read *Decisions*; when they entertain themselves with *Poems*, let him read over the *Pleadings* of the *Bar*: And so by an easy and agreeable Change of his Studies, let him gently unbend his Mind, when it is loaded with the Weight and Multiplicity of his Affairs.

An *Advocate* ought always to have beside him, and should carefully peruse that excellent Book of *Bertochinus*

Tuscan

Tuscul, and other *Indexes* ; but yet he must beware of trusting too much unto them ; for he who is only learned by his *Index* does not deserve the Name. This servile and precarious Knowledge neither furnishes a Man Subject and Matter of Thought, nor enables him to make a sudden and pertinent Reply ; altho true and solid Learning is both the *Orator's* Ornament and Defence. And yet these Persons are certainly in the Wrong, who fill their Writings with long and tedious *Citations* ; especially those who so unconscionably crowd them into their Discourses that they become perfectly flat and insipid, and can never please any Man, who has a true and natural Taste. This is a Fault whereof young People are very apt to be guilty, who, coming warm and heated from their Studies, nor having yet attain'd sufficient Experience

of the World, or any Knowledge of *Decisions*, and being utterly ignorant of the Way of deducing Arguments from the Nature of the Thing, from the *Analogy* and Agreement of the *Municipal Laws* with those of other Nations, and from the like Cases and Circumstances, do utter undigested those things they have last met with in their reading.

I am a great Admirer of the *French Pleadings* which are written in their *Native Tongue*, but with all the Beauty and Elegancy of the ancient *Romans*. And yet Foreigners generally find Fault with their frequent *Citations* of the *Fathers*, and the *Classick Authors*; for this is certainly to no manner of Purpose, and signifies nothing to the *Judge*. Nor will ever *St. Austin* gain the Point where *Ulpian* ought to have prevail'd.

Young *Advocates* are also in the
Wrong

Wrong when they trust more to *Law* than to *Matters of Fact* in the *Causes* they plead ; fondly imagining that while they only urge *Facts* and *Circumstances*, they handle too mean a Subject, and therefore they move a great many Things that are very impertinent, and altogether foreign and remote from the Purpose ; and behave themselves with a great Deal of Learning, but little Sense, discovering indeed the Vastness of their Reading, but at the same Time betraying the Weakness and Insufficiency of their Judgment. But in *Cicero's Pleadings* we find that great Orator is very careful and exact in enumerating every particular Circumstance, and endeavours to represent them in their true and proper Colours. In his *Defence of Milo*, he descends with a happy Care and a necessary Curiosity into the minutest and most inconsiderable Matters

ters, and takes Notice of his putting off his Shoes, his changing his Habit, and his Lady's dressing her self with the utmost Care and greatest Leisure, without omitting the numerous Retinue of Waiting-Women and Musick-boys that attended them.

From all which, he takes Occasion to insinuate to the *Judges* that *Milo* could not possibly have contriv'd the Death of *Clodius*, or ever meditated his Ruine. And in this Point *Orators* imitate *Painters*, who dwell upon every Hair of the Head, and gain a juster Reputation by a lucky Resemblance of Nature, than they can reasonably expect from the Brightness of their Colours.

As every Man has a particular *Genius*, so he has also his own *Stile*; and it is very usual for us to recommend that as the best to others to which our own Nature and Inclination lead and determine

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determine us. And this is the most proper Reason that can possibly be assign'd why some only commend that which is full, and round, and copious, and others extol both by their Applause and Practice that Stile which is more nervous and exact.

For my Part, I would not strive against my *Genius* in conforming my Stile to that of another Person; we are much more hurt by this Force which is impos'd upon us, than assisted by the *Shadowing* and Imitation of the finest Copy in the World. They who are in Hopes, that by Imitation their Wit and Invention may be improv'd, do with some Colour of Reason make a Doubt whether we ought always to propose to our selves these Authors which our own *Genius* most inclines us to follow: Since it is easier for us to comply with their Stile, and the Passage from our Nature
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to theirs is readier and smother; and I am Inclined my self to be of this Opinion. But when we are apt to be led into any Excess, and are ready to write a Stile which is either too concise or too copious, in this Case we ought to turn our Thoughts and Attempts that Way which is most contrary to our natural Inclination: And therefore those who are in Danger of falling into the Obscurity of *Lipsius* ought to peruse *Cicero*, and they who write a round and flowing Stile, like that of the *Roman Orator* should study *Lipsius*. But after all we ought to consult our Friends upon this Head, and desire their Opinion about the Faults of our Stile, that so we may retrench all the unnecessary Superfluities and Excrescencies of it, and make up its Deficiencies and Wants, before they grow into Habits, and by gaining too much upon us be
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not so easily remov'd : For no Man can judge of his own Affairs exactly or impartially : *Nec sensus super sensorium sensationem producit* ; as Philosophers love to speak that is, every Sense requires an Object distinct from it self.

But, abstracting from all Consideration of that which is peculiar to any particular Person, a diffus'd and copious Stile seems, in my Opinion, to be fittest for pleading Causes, and most proper to persuade. And this the Romans recommend unto us by their own Example, and was particularly the Judgement and Practice of Tully in this Matter.

And therefore lest Advocates, too fond of this Stile, and too much indulging this fluent Strain, should exceed all Bounds and Limits, Pompey (who was the first that attempted to lay a Restraint upon the Exuberancy of Orators) allow'd the Accuser only

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two

two Glasse, and the *Defender* three. That which is long (as *Phalerius* says concerning *Elocution*) has always in it something which is great and Majestick : And thus we find that among the Writers of the *Epick-Poem*, and with *Architects*, in their most august Palaces, every thing they design to be more conspicuous than the rest, is large and bulky. Add to this that our Bodies are so made and fram'd by Nature, that the biggest and largest are always sure to be the strongest too. And as frequent and repeated Stroaks both by their Force and Number soon render the hardest Iron soft, and ductile ; so a great many handsome Expressions, altho they may tend much to the same Purpose, do mightily soften and incline the *Judge*. For it is not a concise and short Way of speaking, but that which is round, and lofty, and magnificent, which roars

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and thunders, and bears down all that oppose it. What at first escap'd the Notice of an inadvertent *Judge*, a handsome *Repetition* will make up and supply : And if the *Orator* did not gracefully enough express himself in his first Attempt, it may be, he will succeed more happily in his second.

We ought also to alter the *Phrase*, and use different Turns of Expression ; not only in order to gain the Applause of the *Audience*, but that their Senses which are so often struck in the same Part, and so much wearied and fatigu'd may be somewhat relieved by this pleasing Variety and agreeable Change. And thus *Figures* and *Metaphors* were only at first introduced to gratifie the Senses and please the Ear. But tho in *Poetry* we are wont to make use of them with a great deal of Freedom, even to Excess and *Wantonness*, yet we must of Necessity be more sparing of 'em at the *Bar*,

which is destin'd for grave and serious Affairs. And yet he who is too nice and scrupulous in this Matter, and unhappily confines himself to too narrow Bounds, is always sure, either to suppress something that ought to be told, or to darken and obscure that which he speaks : Whereas he who only falls into the Inconveniency of saying too much, exposes every Thing in its proper Colours to the View and Consideration of the *Bench* ; and it is certainly much easier for the *Judge* to chuse what he thinks best out of those Particulars the *Advocate* propounds unto him, than to guess and form probable Conjectures of these Things which are omitted and ought to have been said. This Exuberancy of Wit and Fancy is the Fault of a happy *Genius*, and a copious Invention : And this fruitful Soil, which without any Industry of the Husband-Man does

does of it self produce so plentiful a Crop of Weeds and Thistles, when once it is carefully manur'd and labour'd by some skilful Hand, will fully reward all his Pains, and abundantly answer his largest Hopes and Expectation. And therefore one, who makes *Eloquence* his Study, must, above all things, endeavour to attain a copious and flowing Stile, which afterwards he will learn to adorn and correct with greater Ease and Advantage. For nothing is more natural than first to provide Materials, and then to polish and refine them, in Order to make up excellent Work. And I have known some Persons, who, without any nice Choice or Propriety of Words, and any Care about the agreeable Ornaments and Graces of Speech, by a fluent and ready Stile, have acquired the Reputation of *Orators*; whereas those who are too solicitous about the

Choice

Choice of Words, while they are in Pain to find them, do frequently make so great a Stop in their Discourse that they often pass for impertinent Bunglers: For our Attention insensibly abates and grows cold and indifferent by Degrees, when it is not continually sustain'd and supported. But he only deserves the Character of a compleat and accomplish'd *Orator*, who, by weighty & significant Words, not too vulgar or commonly us'd, by harmonious Periods that are always equal among themselves, and a flowing *Stile* so much entertains and charms the *Judges* that he insensibly engages them in his Interest, and gains their Approbation and Applause. And yet an *Orator* ought to change his *Stile*, according to the Difference and Variety of Subjects he may have Occasion to handle: In the Beginning and End of his Discourse he should be
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more full and copious ; in propounding his Arguments more short and concise ; and as *Cicero* excellently observes, “ He is truly eloquent, whose Stile, in discoursing of mean Subjects, is fine and handsome ; in treating the Great, grave and Majestick, and in handling such as are of a middle Nature, neither rises too high nor sinks too low.

Altho a concise Stile is proper for the Decisions of the Bench, and a more diffus'd Diction is fitter for the loud Pleadings of the Bar, yet, in my Opinion, an accomplish'd Orator ought to aim at an absolute Command of both. Which if he is once so happy as to attain, he shall be able to reduce his wandring Adversary to a precise Point of Law, and confine him (if I may so speak) within a Magical Circle ; and, on the other Hand, if his Opposer is a close and pointed Speaker, he shall be in

in Condition powerfully to bear down and oppress him by the Exuberancy of his Discourse, and will easily oblige him to abandon those narrow Bounds to which he had confin'd and restricted himself. This double Stile is extremely necessary to an *Advocate*; because by the one he is able to extricate himself from any Strait to which he may possibly be reduc'd, and by the other to involve his *Adversary* in Difficulties; as he sees Occasion.

If I were going to plead at the *Bar*, after I had taken an exact View of the *Matter of Fact*, and duely weigh'd and consider'd all the *Circumstances* of it, by which Actions are set in different Lights, and appear with various Aspects, as Faces suffer a sensible Alteration by their different Lineaments, and Features; I would have Recourse to my own Fancy and Invention

vention, before I consulted any Books upon the Head. For they who at Rights betake themselves to Books, render their *Genius* so lazy and unactive that for the future they shall hardly be able to furnish themselves one single Argument out of their own Head. And if I had a fit Opportunity, I would try the Force of my Arguments either with my Adversaries or Assistants; and when I had invented any Topicks for a Debate, and read as much upon the Subject, as I thought sufficient for my Purpose, I would take another View of the whole, and consider it a second Time. After this I would write down a Plan or Scheme of my whole Discourse, that so, upon mature Deliberation, I might know, if my Arguments, thus expos'd to View, were sufficiently form'd and digested, and dispos'd in a right Manner, to which afterwards I would give the

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last Stroak, and finish in such a Stile and Method as I thought most proper and convenient for 'em : And altho I would never confine my self to a close and servile *Repetition* of what I had thus written, yet I would write them down as exactly as if I resolv'd to repeat every Word. But nothing does more animate an *Orator* than a firm Perswasion of what he says, and a hearty and entire Affection for his *Client*, and his *Cause*. From these Sources I have often seen impetuous and resistless Torrents of *Eloquence* break forth, which overturn'd every thing that oppos'd them, by their rapid Course ; insomuch that their violent Shock could hardly be sustain'd by those who at other Times were wont to be pretty equal to them. For, by this friendly *Warmth*, an *Orator* is so nobly *enflam'd* that he excites *Light* to himself, and at once con-
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found and consumes his Adversary.

The Parts of a Discourse, according to the *Modern Way of Pleading* are only the *Preface*, the *Narration*, the *Disposition* of the Arguments, the *Confutation* of those of our *Adversary*, and the *Conclusion*. *Prefaces* are never us'd at the *Bar*, but in the most considerable *Causes*, and are the same thing to a Discourse, which a *Porch* is to a Palace ; and as a large *Portico* before a small private House would be very ridiculous ; so one who should go about to prefix a solemn *Preface* to a mean and inconsiderable *Cause* would certainly expose himself. But for the same Reason we ought to bestow a great many Beauties and Ornaments on *Prefaces* as we do upon *Porches*, altho those are never pleasing or agreeable that are taken out of common Places, but which naturally arise from the *Cause* it self, as the Flower
F 2 springs

springs upwards from its Root. And sometimes it very luckily happens for him who *answers*, that he may naturally take his Preface from his *Adversary's* Harangue. In which Case, as if he spoke *Ex tempore*, and without any Thought or Preparation, he will make the *Judges* conceive a mighty Opinion of the Sprightliness of his Fancy, and the Sincerity of his Discourse. In Order to begin an Harangue in an agreeable Manner, I would think it proper to compose and finish the whole Discourse, before I attempted the *Preface*; that so upon a full View and Survey of the *Cause*, I might chuse such a Way of beginning it, as were most easy and natural, and would best please my *Auditors*. For they who first employ their Thoughts in composing the *Preface* (as almost all *Advocates* are generally wont to do) are very apt to begin their Harangues rather

rather in a florid than a natural Way. The Business and Design of the *Preface* is to avert and carry off the Anger of the offended *Judge*, which may possibly be occasion'd by some unjust Reproach, or malicious Imputation; to blunt the Edge of Envy, when it is pointed and sharpen'd by wicked and abominable Arts; and in short to gain his Esteem and Affection by making your *Client* appear in a true Light, and exposing your *Adversary* under a Disadvantage. When the *Narration* is long, the *Preface* must be short, and so proportionably, when the contrary happens; altho the Beginning must always be in some Measure accommodated to the Rest of the Discourse; lest otherwise the *Head*, by its prodigious Bulk, should render the *Body* monstrous and unwieldy. If more *Advocates* than one plead upon a Side, he only, who speaks first should

should make use of a *Preface*. And when the *Judges* are already wearied with their *Preambles*, if their Adversaries also use them, they will mightily offend the *Bench* by so *nauseous* a *Repetition*. To this may be added that those who debate in Behalf of the same *Client*, and bear their Parts together in the same *Cause*, ought always beforehand to compare their Arguments, lest otherwise, by contrary ones, they cut each other's Throats: For they only plead to the best Advantage who seem to have all the Variety of two Persons, and the Harmony and Agreement of one.

After the *Preface*, follows the *Narration*, which propounds and represents unto us the *Matter* of *Fact* adorn'd and defended by all the Circumstances and Colours that the Nature of it will permit or allow. In which the Strength of Judgement
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more conspicuously appears than the Force of *Eloquence*. And yet it is not requisite that Truth be represented in so plain a Dress, as intirely to be divested of all the Charms and Advantages of a handsome *Diction* : For the *Narration* does not proceed from a disinterested *Witness*, but one who is *Patron* of the *Cause*. But the *Eloquence* that is proper to *Narrations* is such, as by it the *Orator* makes those Things seem to be present and visible which are absent and already past ; insomuch that the *Auditors* do not imagine they hear, but see with their Eyes what he relates. And this plainly appears in the *Pleadings* of *Cicero* against *Verres*, which are the best Models and Patterns in the World of just and natural *Narrations*. An *Advocate* may here also be allow'd by an agreeable Sprightliness and Vivacity of Fancy to relieve the Minds of the
Judges

Judges, that are apt to be wearied by a tedious Relation. We ought to dwell upon these Points which strengthen and confirm our *Cause*: And we shall certainly be Fools to our own Interest, if we do not omit and pass by those which hurt us, when there is no Possibility of lessening them by any Colours, we can put upon 'em. And yet a frank and voluntary *Confession* of those things we know shall be prov'd against us will very much extenuate our Guilt, and gain the Favour of the *Judge*: And therefore I think it more adviseable to answer them by Way of Prevention and Anticipation of the Charge, than entirely to hide and conceal them. As *Prefaces* are not always us'd, because many, who dare not trust to their *Eloquence*, do presently begin with the *Narration*, so when the Business in Question, or the principal Subject of the

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the Controversy is confin'd to a particular Point of *Law*, and propounded as a *Position* by the *Judges*, the *Narration* is not necessary, unless there is some Circumstance, which may possibly conduce to the Illustration of it. And in this Case we may be allow'd to pass by those *Matters of Fact* that tend to the Prejudice of our *Cause*. But then if the *Judge* do not propose the State of the Controversy in an express Form of Words, an *Advocate* shall the easier gain his Point, and fall into the fewer Inconveniencies, by how much the shorter and conciser Way he takes of propounding the *Case*. And therefore I am extremely pleas'd with the Method of those, who before they adduce their Arguments, do so free and disengage the State of the Controversy from all Objections or Difficulties they may probably encounter, by yielding every

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Thing that can be granted, and removing all the Doubts that might trouble and incommode them, that they leave Nothing to be urg'd which can signifie any thing to the Purpose, and luckily prevent and anticipate all that their *Adversarys* can possibly object.

We must pass, by an easy *Transition*, from the *Narration* to the *Arguments*: And altho many affirm that only one or two weighty Arguments ought to be propounded, because they place Truth in one single Point which, they say, we should only urge; yet I am of Opinion that no Topicks ought to be omitted which do any Way tend to the strengthening and illustrating of our *Cause*.

For where many *Judges* sit on the *Bench*, Variety of Arguments may probably have different Effects upon them, and that which to the *Orator* seems

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seems weak and inconsiderable, and on which he lays very little Stress, may yet chance to prevail with some of the *Judges*. And this seems to have been the Opinion of the younger *Pliny*, who in his twentieth Letter introduces *Regulus* and himself thus debating the Matter. " You, said, *Regulus* unto me, urge every Point and Circumstance which you imagine may serve your Turn ; I presently see the Throat of my Adversary, and thither I direct my Stroak : I answer'd him it might happen that he should light upon the Thigh, or the Knee, when he fancied himself sure of the Throat. But I, who cannot so easily discover the Throat, do aim at every Part of the Body. For the Tempers and Dispositions of *Judges* are as obscure and cloudy, as deceitful and uncertain, as the most boisterous Storms

and Tempests. I shall add one Observation which Use and Experience, the best of Masters, have taught me to make, that hence it happens that those who at the same Time take Cognizance of the same Cause do often entertain the same, and frequently contrary Opinions; and yet are induc'd to think so, from different Motives and Considerations.

We ought as much as possible to avoid too frequent *Repetitions* in our *Stile*, and, in the *Invention*, a trifling and impertinent Heap of insignificant Arguments. For those who are too talkative extremely vex and incommode the *Judges*, and by too nice and scrupulous *Distinctions* do weaken and enervate the Force of their Reasoning. They who too much divide their Arguments, from deep ones render them weak and shallow; as Rivers cut

cut out into many Streams and Branches become quickly fordable and lose their Depth. To this may be added that *Judges* are very apt to suspect the Validity of their Arguments, when they discover many of them that are not *conclusive*; as *Merchants* are not easily, for the future, inclin'd to believe those who have formerly deceiv'd them with bad Commodities and corrupted Wares. An *Orator* ought therefore to dwell and insist upon these Arguments which are forcible and *conclusive*, and as for those that are weaker and do not so well *conclude*, he should only offer them transiently, and by the *Way*, or add them to those which are stronger; that so these may bear down in Conjunction with the rest, which by their own Weight are of no Moment or Consideration. But then these weaker Arguments ought to have some Affinity

Affinity with those which are more valid ; as an *Unite* increases the Number, and enhances the Bulk : For otherwise, if they be not deduc'd by an easy and natural Consequence from the Subject-Matter of the Discourse, they will produce Nothing but a meer *Chimera* by their imaginary *Conjunction*. And yet if I had a strong and unanswerable Argument, I would trust to it alone, and not propound any other, lest my *Adversaries* should by this Means find more Matter of Dispute and a larger Field of Controversy : I would frequently urge and repeat it ; that so by this Confidence and Assurance I might enhance its Value. But there are some, who, to gratifie their own Vanity and Humour, transgress their Bounds, being more concern'd to acquire an empty and insignificant Applause to them-

selves

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selves, than to gain an honourable and useful Victory to their *Clients*.

I am not at all pleas'd with the Method of those who pour forth and diffuse all their Arguments without any Distinction in one continu'd Harangue. And yet this may be necessary, when the Discourse is jointly made up of *Presumptions* and *Authorities*; in the managing whereof the *Orator* insensibly passes from one *Presumption* to another. The marking and dividing of all the Particulars of an Harangue, by the *Distinctions* of *first* and *second*, denotes their Number, and confirms the *Judge*. But the reducing of them into *Syllogisms* is neither possible nor agreeable to the Nature of *Rhetorick*; an *Induction* of particulars and *Enthymems* being infinitely more accommodated to it. For generally all the Arguments of *Orators* are only instead of a *Subsumption* or the *minor*
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An Idea of the
Proposition, as appears in *Falshood*, and
other Crimes. But if one Argument
is eminently stronger than the rest,
in Order to render it more *formal*, it
may be reduc'd into a *Syllogism*; and
just so every thing that has been al-
ready said may be recapitulated in the
End of the Discourse, and put into a
Syllogism's Form.

The Force of the Orator's Genius
does as much appear in the *Disposition*
as in the *Invention* of the Arguments,
insomuch that there are some who
by this one Quality have as much the
Advantage of others as the most learn-
ed Men in the World have of the
most ignorant. For Arguments that
wander out of their proper Place are
like Souldiers who desert their Co-
lours, or are disorder'd and put out of
their *Ranks*. Every Man contrives
to himself some Method in the *Dispo-*
sition of his Arguments; but for my
Part

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Part I am best pleas'd with that which Nature has invented and Experience confirm'd ; namely that whereby those Arguments are propounded in the first Place which clear the Subject of the Cotroversy, and illustrate the Nature of it. From this I would pass to the *Laws* and *Citations*, that so I might urge those Things last which, I thought would most incommode my *Adversary*. And in all these I would proceed from the weaker Arguments to those that are stronger and more valid : For it is natural that every thing by growing and advancing forwards should acquire new Strength ; and the *Judge* who has already heard those that are forcible, despises these which are more infirm ; whereas on the contrary a Man never languishes who is always in Hopes that the best is yet to come. Besides, that these Things

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which

which are urged in the last Place are always sure to make the deepest and most lively Impression: For these Arguments that are first propounded, as it were by a new *Superinduction* are in a great Measure effac'd and obliterated by the last. And therefore *Phalereus* gives us this Advice, that we should not seem to grow weak and faint by descending from a stronger Argument to one that is more infirm: Nor does *Nature* here need to be supported by *Authorities*. But when Arguments have a very near Resemblance and Affinity with each other, I would chuse rather, upon this Account, to join them together; and when one is the Foundation upon which the other is grounded, and prepares the Way for it, in that Case, I would adduce them according to their natural Order. And yet *Cicero* was of Opinion that the strongest Arguments

ments should be propounded in the first Place, provided that these which are equally good and valid be reserv'd to the End of the Discourse ; those of a middle Size being thrown into the Heap and Body of it. And indeed this is then most necessary, when an *Orator* makes his first Appearance at the *Bar* : For by this Means he may have the Advantage of preposessing the *Bench* in his Favour ; or else when the *Cause* is *unpopular* and lies under some scurvy Imputation ; that so by a powerful Argument he may presently bring over the *Audience* to his own Side.

In returning an Answer to the Arguments of our *Adversary* the *Replier*, among us, does in the Beginning of his Discourse faithfully repeat all the Arguments of his Opposer, before he enter upon the *Confutation* of them. And he, who in his Answer

60 *An Idea of the*
to the Arguments of his *Adversary*
endeavours to lessen their Force, does
plainly discover to the *Audience* that
he is either ignorant or affraid of the
Validity of them. But yet in the
Return we make to our Opposer's Ar-
guments we may be allow'd to distri-
bute them into several Ranks, and
cunningly to diminish their Number
by reducing them to fewer Heads.
We may also change their Order, and
answer that Argument first, by which
a *Reply* to the subsequent ones may
be made with the greater Advantage,
altho our *Adversary* did not urge it
in the first Place. There are some
who seem to despise those Arguments
whereof they are most affraid, and to
applaud and dwell on the *Confutation*
of these, whose Force they are sure of
escaping: But I do not approve of
such a Piece of Disingenuity, and am
not pleas'd with these Artifices, be-
cause

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cause of the extreme Hazard and Danger that attend them; since a wise and sagacious *Judge* will easily detect them to the Dishonour and Disadvantage of our selves and our *Cause*.

These *Digressions*, call'd by *Quintilian*, *Egressions* are now grown out of Use, which were yet look'd upon by the *ancient Orators*, as the greatest Ornaments of their Discourse. Nor if we were pleading in *Defence* of the *Poet Archias*, would we be allow'd, with *Cicero*, to make an Excursion upon the Praises of *Poetry*. For the *Judges* would soon oblige us to return to the Subject of the Debate, and our *Audience* ridicule us as impertinent Transcribers of *Common-Place-Arguments*. But altho before, we enter upon the *Arguments*, we may be allow'd, to add to the *Narration*, those Things which may properly be spoken in Commendation of our *Cause*, that by this Means we may

may somewhat diminish the Severity of the Charge, and so engage the *Judge's* Favour, as at least to obtain a patient hearing; yet these Reproaches, which our *Accuser* may possibly deserve, and we sufficiently incline to to throw upon him, (if they are necessary to our *Defence*, and relate to the Subject of the Controversy) are not yet, in my Opinion, to be bestow'd upon him, till such Time as we have fully deduc'd, and made good all the Arguments that can be offer'd on the Head. For we ought hardly to be permitted to *impeach* our *Accuser*, when we have not yet clear'd our selves from the Suspicion and Imputation of these Things, which, in his Accusation, he has laid to our Charge: Nor can we have the Face to defame that Person, with such Vigour and Boldness as is necessary upon those Occasions, whom we
have

have not yet convicted of a false *Accusation*: Whereof we have an Instance in that sharp and severe *Pleading* of *Demosthenes* against *Æschines*.

When the *Orator* comes to the *Epi-
logue* or Conclusion of his Discourse, he may then securely rely on the Assurance he has of the Validity of his Arguments, and not, as in the *Preface*, beseech and intreat the *Bench* in a humble Strain: But now being sure that he has the *Law* upon his Side, he may use all his Endeavours to gain the Favour and Affection of the *Judge*. Here then is a large Field of *Eloquence*; here one may employ all the moving Graces, and agreeable Ornaments of Speech. What was before firmly establish'd by the Authority of the *Laws*, may here be handsomely but briefly repeated; and those Things which before were spoken separately, may now be collected into one Body,
that

that so by this Union and Conjunction the Force of the Arguments may be increased. Here we may take Occasion, to put the *Judge* in Mind of the great Inconveniency which the granting of our *Adversarie's* Request will derive on the Publick ; how much the Interest of the Commonwealth is concern'd that this Business be determin'd in Favour of our *Client*, and what is the Opinion and Expectation, both of the Learned and the Vulgar concerning this *Cause*.

In these *Prefaces* and *Epilogues* an exact Equality of the Periods, and an agreeable Harmony and Justness of the Cadence may even in our Age be observ'd ; but in urging or confuting Arguments, the Case is very much alter'd : For the *Ancients* pleaded by *Eloquence* and *Presumptions*, but we do it with *Reasons* and *Citations*. And as Souldiers in the Heat
and

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and Fury of the Engagement are
apt to forget their Ranks ; so we
finish our Arguments and render them
forcible rather by the Equality of
the Subject than of the Period, and
throw off our *Rhetorick*, as we use
to remove the *Trammel* from our
Horses, by which we taught them to
amble, when once we are enter'd u-
pon our Journey.

How much an *Orator* is recommen-
ded by an agreeable Behaviour and a
just Way of accenting his Words may
easily be perceiv'd from the Success
and Applause which *Actors* meet with,
who make a handsome Figure on the
Stage ; insomuch that they lead the
Affections of their *Audience* whither
they Please, and with the greatest Ease
in the World raise all the Passions,
and Emotions of the Soul. And
since the *Harp*, by its agreeable Me-
lody, is able to soften and compose
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the unruly Passions of a distracted Mind, what may we not reasonably hope from this living and animated *Musick*, so nearly related to the Soul it self? For *Souls* are easily fir'd with each other, as *Light* is by *Light*. So that an *Orator* ought to form his Words and Gestures in such a Manner as may be suitable to the several Passions of the Mind of Man, and by this lively Behaviour animate and inspire his Discourse. And yet he must remember, it is an *Orator* who speaks, and not a Player or an *Actor*. For it is unbecoming an *Advocate* to burst his *Lungs*, and weary the *Judges*, or by a furious Way of crying and bawling, like a Mad-man, or a barking Dog, to throw off all Humanity, and Sense, and Judgement. For who can believe that these Things proceed from a calm and composed Mind, which are spoken by those who behave themselves

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selves like Mad-men and *Enthusiasts*?

An *Advocate* must also take Care that he be not fir'd with the same Warmth and Ardour from Money as from Justice: For this is in Effect to hire out our Anger and Resentment. But then in my Opinion, those do as much deserve to be blam'd, altho for a different Mistake, who are neither capable of moving others, nor suitably affected themselves, but plead with a cold Indifference, and in an insensible Manner. For the *Audience* is apt to believe, that Person is neither perswaded of the Truth of what he speaks, nor concern'd about the Event and Success of the Affair, who does not at all seem to be mov'd with what he says. And then a Man's Gesture and Behaviour, passing through the Eyes into the Soul, does powerfully excite the like Passions in it: For one uses a double *Eloquence*

that pleads at once both with Mind and Body. Besides, a proportionable Degree of Warmth and Ardour dissolves the *Orator's* Spirit and banishes Fear, that cold and frozen Passion; and upon these expanded and aspiring Wings, the Soul flies to immortal Fame. Add to this that the Voice of the *Orator* ought to be suited and adapted to the several Parts of his Discourse. Points of *Law* should be gravely urg'd: These Things which are ask'd, either in the Beginning or End of our Harangue, must be express'd in a humble and submissive Strain; and those which are to be narrated should be pronounc'd with a middle *Tone*. Things that are to be ask'd require a low and submissive Voice; and these which are to be urg'd demand a louder Pronunciation. The Beginning of our Discourse ought to be deliver'd with a grave and

and submissive *Tone*, except in these Things which in Order to rouse and excite our *Auditors*, in an unexpected Subject, do sometimes require sudden and surprizing *Exclamations*. And then it is the Business of the *Epilogue* to express it self with a joyful and triumphant Voice, but yet in a modest Way; unless it is necessary to intreat the *Judge's* Favour, altho even upon such Occasions, I would not advise a Man to weep, as we find, *Cicero* did in his *Defence of Quintius*.

Our Voice must also be alter'd according to the Variety of *Figures* we make use of; for in the *Prosopopeia*, because another Person is introduc'd in our Discourse, a different *Tone* of Voice is requir'd. In the *Antithesis*, the *Contrariety* of the Subject demands a suitable *Opposition* of the Voice. In *Anadiplosis*, or the Repetition

tition of the same Word, the second Pronunciation must have a higher Accent and a louder Sound than the first. In an *Apostrophe*, because we address our selves to those who are absent and at a Distance from us, our Voice must be more elevated and higher rais'd. When we would affect our *Audience* with Joy and Admiration, we must use a loud, but a pleasing Voice; when we would imprint Grief and Fear, a shrill and timorous Accent is proper: We must pronounce those Things that ought to raise Indignation in a loud and threatening Manner, and these whereof People ought to be ashamed, with a Sort of *fugitive* Voice. In *Transitions* we must always take Care gently to proceed to the End of the Sentence: For Nature abhors all sudden and violent Motions, and loves rather to be led than drawn.

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In Order to form our Voice according to these different Turns of Speech, it will be very convenient to pronounce aloud, after the Manner of a *Declamation*, either some of our own Performances, or of *Cicero's Orations*, or some of the ingenious *Pleadings* of the *French Lawyers* in Presence of our Friends, who are capable of correcting the Errors of our Pronunciation. The whole Man appears in the Face; and therefore our Countenance ought always to humour our Words, and be adapted to them: For there is Nothing so improper and unnatural as to express trifling Matters with a serious Air, and to discourse upon grave Subjects, with a laughing Face. We ought also to improve our Gesture by the decent Motion of our Hands: To move them always is like an *Actor*, and never to move 'em at all is like a *Statue*

Statue ; but none of these is proper for an *Orator*. But those things may better be learn'd by a nice Observation of other People's Behaviour, than from the Perusal of Books. And therefore we ought to propose some Person to our Imitation, whose Gesture, in publick Appearances, by a happier Success, has had the good Fortune to please others : And sometimes perhaps it may not be improper to consult our *Looking-Glass*, while at Home in our Closet, we form and prepare our selves for the publick Practice and *Pleadings* of the *Bar*.

There are a great many different Turns of Expression, and Kinds of Gesture, which the Nature of our Subject does plainly point out unto us. What Man that is going to mention the *Heavens* would look down to the *Earth*? And who would pro-

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pronounce these Things which deserve Admiration with a low and timorous Voice. The *Conjunction* of Things requires the *joining* of Hands; and the *Attraction* of things may be express'd by the *closing* our Hands; and proportionably when the contrary happens. And if the Gesture may be perform'd by the Motion of one Hand, we should use only one; and that ought always to be the right Hand. But yet we must observe that it is not proper, the *Orator* should imitate all natural Actions. For what Man that is going to discourse about a *Gun-smith*, or *Musician*, would imitate their Behaviour at the *Bar*. Besides, the Customs of every Country have monopoliz'd some particular *Gestures* of the Body, and *Tones* of the Voice, which would perhaps seem indecent in other Places of the World. And the Fashions that now prevail,

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have intirely antiquated, and brought into Desuetude many of these Gestures which are mention'd by *Quintilian* and *Tully* ; such as the violent striking our Knee or Forehead, walking hard and distorting the Body ; all which would be laugh'd at and ridicul'd by a modern *Audience*. But this is certain that he who would strongly imprint any Passions in the Minds of his *Auditors*, must first endeavour to excite them in his own. Thus we find *Polus*, when he was to act the *Electrum* of *Sophocles* upon the Stage, held in his Hands the *Urn* of his own Son who had lately deceas'd, instead of the *Urn* of *Electrum* ; at the Sight whereof he drew Floods of Tears both from himself and the *Spectators*. And just so the hearty Affection an *Advocate* bears to his *Client* will so raise his Spirit, and inflame his Soul, that his Discourse will prove like

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like *violent Fire*, whose Force and Vigour Nothing shall be able to resist.

And here I cannot but express my Wonder and Surprise, that, notwithstanding the daily Increase of Experience (the most excellent Mistress of *Oratory*) and altho the *Body* of our *Law* is considerably enriched and improv'd by a great many new *Statutes*, and *Arguments*, and *Decisions*, (the best Foundation, and most proper Materials of an Harangue) yet this *Eloquence* of the *Bar* does daily decay. The only Way I can possibly fall upon of accounting for it is this, that of old *Eloquence* being esteem'd noble and commendable in its own Nature was cultivated, and improv'd for its own Sake ; and the *Gratitude* and *Prudence* of the *Ancients* return'd to it, not as a Reward and Encouragement, but as a just Debt and Tribute, Glory and Applause, and the supreme

Management and Administration of Affairs. For those divine and immortal Spirits that shone so bright among the *Greeks*, and *Romans*, by resolutely *defending Private Persons*, and generously espousing their Quarrels, were, in Consideration of their eminent Services, by the Votes and *Suffrages* of these *private Men*, advanc'd to the most honourable Posts and Dignities of the State, and employ'd in *Defence* of the Common-Wealth.

But now the Love of Money so unhappily prevails, that Nothing else is regarded, and the despicable Prospect of Gain and Profit is the only Measure of all our Wishes; insomuch that our *Modern Advocates* seem to mind Nothing but their own Interest, and the sordid Advancement of their private Fortunes. And by this Means their *Genius* is render'd incapable of lofty Designs, and never aiming at
high

high Matters cannot possibly attain the greatest Things. Besides our Judges, being desirous of acquiring the Reputation of Celerity and Dispatch, in the *Decision* of *Causes* are not very fond of hearing a Business discours'd upon at full Length : And thus the Liberty of Pleading being deny'd the *Orator*, together with this Freedom, the *Art* of *speaking handsomely* has also decreas'd. And then that impertinent Crowd of *Procurators*, whom *Clients* employ in the *Transaction* of their Affairs, being utterly unacquainted with true *Eloquence*, do only chuse and commend these *Advocates*, who have a mean and subtle Way of managing *Causes*, and do indeed plead with a great Deal of Caution and Circumspection, but very awkwardly and with a very bad Grace. Nor is it improbable that the Study of that false and *sophisticated Philosophy*

phy, which at present is so much in Vogue in the Schools, by its impertinent Quibbles, and tedious Jargon about Things of no Moment, and by its harsh Terms, and barbarous Expressions has very much o'erclouded the Minds of Learners in the Beginning and Morning of their Studies; who by this Means extremely disorder'd and confus'd are presently sent to the *Doctors of Both Laws*, (as some love to call them) who in a barbarous and uncouth Stile pretend to teach them the *Roman Law*.

The *ancient Orators*, who liv'd in a free Common wealth harangu'd their *Audience* with a great deal of Boldness, and believing Nothing to be above them, aspir'd to the highest Things; and from a Breast which no superior Force control'd, and that was affraid of no Body, proceeded every thing that favour'd of Liberty and was worthy

thy of it. For being accustom'd to plead before Free-born People they knew no other Limits or Restraint, than what they impos'd themselves : They were allow'd to say what they pleas'd ; and every Thing *pleas'd* them which savour'd of the noble Ardour of an *ingenuous* Soul. To this may be added that many from that malicious inclination, which is common and natural to Mankind, of reducing all to the same Level and Equality with themselves ; because they are not able to raise themselves to the utmost Pitch of true *Eloquence*, do therefore pretend to despise and undervalue those *Orators*, whom they cannot equal ; and endeavour to bring them down to their own mean Condition, when they perceive, there is no Possibility of exalting themselves to that stupendious Height of *Eloquence* which they have so gloriously attain'd. And thus

So *An Idea of the*

thus they make it their Business to bring the *Art of Speaking* handsomely into Disrepute, whose Fame and Reputation shall have the same Bounds with the World it self, and continue as long as the Universe endures ; and so when they appear at the *Bar*, lest they should be thought affected, they will not so much as seem to be *Orators*, and do not in the least aim at a polite and agreeable Way of expressing their Thoughts. So that, upon the whole Matter, we may conclude that this Harshness and *Rusticity* of ours, is not so much the Fault of our *Genius*, as of the Age wherein we Live.

T H E

The First Pleading,

From the *Law* of

NATURE;

By which a Woman, that had murder'd her own Child, is accus'd before the Men of Inquest, who in Scotland are Judges in Criminal Cases, arising from Matters of Fact; and wherein the Advocate pleads after the Manner of the Roman Orators, without adducing any Citations of the Laws or Doctors.

Gentlemen of Inquest,

THIS Day you shall have a melancholy Proof of the greater Safety and Security which Infants
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enjoy under the Protection of the *Laws*, than in the Bosom of their *Mothers*. And since the *Laws* vouchsafe to employ you as Ministers of *Justice*, and the uncorrupted *Channel*, through which it is convey'd to your Neighbours; let *God Almighty*, the severe Avenger of violated *Laws*; let your Countrymen, who are so much indebted to *Justice* for the Defence and Protection it affords them, be made sensible how safely the Administration of it is lodged in your Hands. No *Criminal* is here *impeach'd* by the Treachery of a corrupted Court, nor oppress'd by the malicious *Accusation* of some insolent Favorite. Here is no Bait of Covetousness in the *Charge*, nor does blind Revenge animate the *Accuser* with a furious Resentment. The *Laws*, and not Men, at their own Expenses, and from a paternal Care, accuse this poor Woman for the Murder

der of her own Child. For she being got with Child in *Holland* by some unknown Person, (and by this *Presumption* an Adulterer) left her Hypocrisy and Dissimulation should be discover'd by the Delivery of her Birth, (for she was a great Professor of Religion) being more concern'd about her Reputation than her Soul, she endeavour'd by pernicious Drugs to murder the Infant in her Womb, and render it abortive. But the Strength of Nature prevailing, and overcoming the Poison, she return'd to *Scotland* her native Country : And when by open Perjuries, and secret Contrivances she had conceal'd her Conception, she resolv'd upon the Death of that innocent Infant, to whom she had given Life and Being; and at length was deliver'd of the Child at her full Time, but yet under the Bed-Cloaths, that so the tender In-

fant might be stifled for want of Respiration. And after she had hid it for several Days under the Bed, she deny'd it with horrid Oaths and Imprecations, when she was urg'd by a great many Circumstances and *Presumptions*, to tell where she had laid it. But her Delivery being discover'd, by the Skilfulness of Women, it was no longer in her Power to conceal the Crime. And yet after she had confess'd the Birth, she endeavour'd to hide the Infant; lest the Marks of the Wounds and Bruises that were imprinted on its Body, should rise up as Witnesses against Her: And therefore she said it was drown'd in a Pond; but when there it could not be found, she would fain have perswaded us that she had taken Care to bury it. But at last, after that by a distracted and a fruitless Search she had not found it, being overcome by the
Horror

Horror of her guilty Conscience, and the Importunity of her *Accusers*, she discover'd the Infant, but so press'd beneath the Bed (in Order to conceal the Bruises) that its whole Body appear'd to be one Wound. *Gentlemen*, If one Man had slain another, if a Woman had occasion'd the Death of her Enemy, or an *Enemy* had kill'd his Opposer ; even these *Criminals* would have been capitally punish'd by the *Cornelian Law*. But if this unhappy Infant had been murder'd by its own Nurse, what Punishments would this Mother have demanded ? With what Cryes and Exclamations would she have stunn'd your Ears ? What shall we then say, when a Woman, guilty of Homicide, and a Mother of the Murder of her own Child, has comprehended all these Villanys in one single Crime ? A *Crime*, in its own Nature odious and detestable ; in a
Woman

Woman prodigious, and in a Mother incredible; and perpetrated against one, whose Age did call for Compassion, whose near Relation demanded Affection, and whose Innocence might have deserved Favour.

In order to prove her guilty of this hainous Crime whereof she is accus'd, I hope, *Gentlemen*, I may be allow'd to take it for granted, that all those are guilty of Murder who kill their Neighbour by Treachery or any premeditated Design; and that the Greatness of this Crime is not to be measur'd by the Loss of Blood but of Life. And therefore one that abandons an old Man upon a solitary Rock, entirely surrounded by Sea, or exposes an Infant on the Top of a Mountain, deserves as severe a Punishment as if he had kill'd them with his own Hands, and sheath'd his Sword into their Bowels. The *Laws* do

do not regard the Means, but the Effects and Consequences of Actions ; otherwise wicked Men would chuse rather to frustrate their Design by their Cunning and Artifice, than publicly to affront them by open Acts of Violence and Injustice. So that by this means their Deceit and Knavery would serve instead of a Pardon ; while it is yet the same Thing to those Miserable Persons, by whatever Ways and Contrivances their Enemies have accomplish'd their wicked Designs. Of all living Creatures Infants are least in a Condition to resist any Violence that is offer'd to them ; and can subsist under it the shortest Time, when they are destitute and depriv'd of the necessary Supports of humane Life. Those who are arriv'd to a riper Age and Judgement, can make Shift, by various Methods, to escape the Ruine which

which is threatn'd against 'em, and destin'd to them; but Infants are not able to entreat others to afford them that Help and Assistance which they are not in a Condition to furnish of themselves. And therefore the *Civil Law* has made the *exposing* of Infants a distinct Sort of Crime, and order'd it to be punish'd as a particular Kind of *Homicide*. And very justly; for who would spare one that was so barbarous as to *expose* an Infant, and by *exposing* it, occasion'd its Death? When a Man happens to kill one who is advanc'd in Years, he may either endeavour to extenuate his Crime, by alledging he was provok'd to it by some intolerable Injury that was done unto him, or he may reasonably hope that the *Judges* will consider the Frailty and Weakness of humane Nature, and that he was blindly hurried on to the Commission of it by Resentment

89 *From the Law of Nature.*

ment and Revenge. But in Infants we cannot imagine a Possibility, either of a preceding Injury, or a subsequent Revenge, since they have no Memory to render 'em capable of the one, nor Judgement to enable them to perpetrate the other. Now of all the Murderers and Destroyers of Infants a Mother deserves to be punish'd with the greatest Severity; in whom the Want of Kindness, and Deficiency in Point of natural Affection is of it self not the lowest Degree of the Crime, and where not to take due Care of 'em, is in Effect, to deprive them of their Life and Being. But this Woman has not only in an unaccountable Manner neglected the Preservation of her Infant, but by her Cruelty kill'd it, and prov'd the Occasion of its Death. For in this Case, that this *Criminal* had long before re-

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solv'd on the Destruction of her Child is plainly evident from the Consideration of this one hainous *Circumstance*, that assoon as she began to be sensible, she was with Child, she took violent Poison, that naturally uses to procure Abortion, which is the only Refuge and *Asile* of these miserable Wretches, who in Reality deserve not any. By which Contrivance she endeavour'd to overcome God and her Conscience, altho she could not vanquish the Strength of Nature ; and so adding one Crime to another, while by repeated Denyals and sacrilegious Oaths, she daily harden'd her Conscience, and enhanc'd her Guilt ; she was at length deliver'd of a Child, even in a Place where Women were present, but never desir'd their Assistance, and tho they cry'd to the *Pannel*, and offer'd her their Help, whose Business it was ra-
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From the Law of Nature. 91

ther to have intreated theirs, yet she obstinately refus'd to acquaint 'em with her Circumstances, and discover her Condition unto them. So that she is not only guilty of refusing to accept of Assistance, which is so barbarous and unnatural a Piece of Neglect, that the *Laws* make it a Crime; but she actually *suffocated* the Infant, by being deliver'd of it under the Bed- Cloaths. For any new-born Child will die, if it lyes but a Moment under the *Bed-Cloaths*, much more if it continues for a whole Night. And if it is true which *Physicians* and *Midwives* positively affirm, that if the first Breathing and Respiration of an Infant is stopt it will presently die, what Possibility was there of this Infant's escaping Death, whose Respiration was entirely stopt for several Hours; and which, altho it had not died, the same Moment it began to

live, yet we cannot imagine would have long subsisted in so miserable a Condition, when it was wallowing in an uncertain Fate, amidst Excrements and Blood ; being wholly destitute of all these Helps, whereof the least is absolutely necessary to the Preservation of its Life? And since in *Law* he who denys one Food and Nourishment is accounted guilty of his Death, how much more Reason, have we look to on a Mother as guilty of the Death of her Child, when she cruelly refuses it the Means of Respiration ; by the Want whereof all things that live by Breathing will with more Certainty and Expedition be destroy'd than by Want of Food. And who can doubt that *that* Person murder'd her Child who shut it up in a Chest? And therefore since the *Laws* have most justly provided against all imaginable Methods

Methods of destroying Infants, not only in Order to prevent it, before it is perpetrated, but also severely to punish it, after the Commission of it; can there any Ground or Colour of Reason be possibly assign'd, why this Way that is invented by the Wickedness of Mankind, and which is the easiest and safest, and most effectual in the World should escape the Punishment it so justly deserves.

Gentlemen, If she had *expos'd* this Child, some fortunate Stranger might probably have sav'd its Life, and by affording it such seasonable Help and Assistance, discover'd that charitable Disposition which its unnatural Mother unhappily wanted, the Cryes of an Infant, in this melancholy Condition, would have excited the Compassion of Travellers, and its Tears were capable of softening and mollifying the Heart of any Stranger in the World

World. But a miserable infant, cover'd and oppress'd with Garments and Bed-Cloaths, was not only destitute of the Help of its Mother, but even depriv'd of the Assistance of every other Thing that could possibly be serviceable to it. In the other Case the Mother's Behaviour would not be so criminal, because she withdrew from so dismal a Sight as the Death of her own Child, which she was not able to behold : But in this, she was cruel and barbarous, who altho she gave Life to the *Embryo* in her Womb, did yet endeavour to destroy it by Poison : And afterwards, when she was deliver'd of it, could endure to see it dying by her execrable and accursed Hands ; and chose rather to expose her Life to the utmost Danger, by suppressing those dreadful and intolerable Pangs of Child-Birth, which only horrid Impiety, and most unaccountable

countable Cruelty were capable of concealing, than to implore the Help and Assistance of her Neighbours, when yet all the Support that can possibly be given to Women in these Circumstances is very inconsiderable and very insufficient.

If ye ask me, *Gentlemen*, what Motives and Considerations may probably have induc'd her to commit this horrid Act; you are not ignorant how vehement and unaccountable are the Passions and Affections of Women both Ways; they love violently and hate immoderately; and to whatever Side they incline, they are not govern'd by Prudence, but transported with Rage. So that if this Reflection concerning the Sex in general is true; what could we expect from this *Panel*, whom neither Modesty was able to reclaim from Lust, nor the Softness of her Sex from Cruelty, nor all her specious

cious Pretences to *Piety* from Wickedness and *Irreligion*? And who by the Death and Murder of this innocent Child was in Hopes, she would escape the Punishment of Adultery, the Brand of *Hypocrisy*, and the Infamy of a Whore. But I would fain ask her, why she thought fit to prefer a servile Banishment abroad, in a forreign Country to the civil and friendly Entertainment she met with at Home? Why she attempted with the extreme Hazard and Danger of her Life to put away the Birth of her Womb, whereof all Mothers are wont to have so tender and affectionate a Care? Why did she conceal her big Belly with such horrid Oaths and Imprecations, when it expos'd her to inevitable Ruine? Whence proceeded that prodigious Strength which enabl'd her to perform her *domestick* Services immediatly after her Delivery

very ? What was the Occasion of that sudden Terror, with which she was instantly struck upon the first Suspicion ? From whence came that miraculous and unaccountable Disorder, whereby she was infatuated to such a Degree, that she could neither find nor conceal the Grave of her murder'd Child ? Are these the infallible Testimonies of a calm and innocent Breast, or of a frighten'd and awaken'd Conscience ? And therefore if we will not trust the *Laws*, let us hear the Voice of *Nature* ; let us take those things for granted which the *Criminal* her self, from a Consciousness of her horrid Guilt has been forc'd to confess ; and lastly let us believe *Almighty God* who has given us so clear and evident Proofs of the Truth and Certainty of this hainous *Fact*, that we may as well require *Sun-shine* at *Mid-night* as demand any further *Demon-*
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stration, since we have all the Arguments on our Side, which the Nature of the thing is capable of.

And from hence we may easily furnish an Answer to those Objections on which the *Pannel's Advocates* lay so much Weight ; and whereby they would fain reduce me to a Necessity of proving that the Child was born alive, since Nothing can properly be said to be murder'd which never had Life and Being. Besides they affirm that all these Things amount to no more than this, that they found a probable *Presumption*, and that no Crime is to be *infer'd* from Presumptions, on which any greater than *arbitrary* Punishment can in Justice be inflicted. To the first I answer that it plainly appears from the Confession of the *Pannel* herself, that she was big with Child, and that the Infant was born at full Time ; which is also confirm'd

firm'd by *ocular Inspection*, taken by Women that are skill'd in these Matters. And therefore by a just and necessary Consequence we must needs be induc'd to believe that the Child was born alive; *for that which any thing ought to have, is always presum'd to be in it.* Nor do we stand in need of clearer *Evidence* against one who by her Treachery, and Wickedness has taken away all Possibility of further Proof, and endeavour'd to conceal one Crime by another.

Gentlemen, let us suppose that two Witnesses saw this unnatural Mother cutting the Throat of her own Child, Would there be any Necessity of proving, it was born alive? Or if it could plainly be made out, that a Mother expos'd her Child upon the Top of a Mountain, in a dark and *tempestuous* Night, Would any Body have the Face to demand a Proof of its being alive

alive before? No, I am confident, it would not be requir'd, for *against one who is engag'd in an unlawful Action, that which in its own Nature will not admit of any further Proof, is look'd upon as fully prov'd.* Nor does this Assertion derive any Danger or Inconvenience, either upon the publick or innocent Persons; since by this Means the avenging Sword of *Justice* shall only threaten the impious and guilty: Whereas, on the contrary, if this Woman escapes, no Mother, tho actually guilty, shall, for the Future, be brought to the Punishment her Crime deserves: (Altho the Murder of innocent Infants is the most atrocious Piece of Villany, and the most heinous and horrid *Crime* that can possibly be imagin'd) and so the one half of it being perpetrated would afford an Impunity to the other. Besides that when the *Laws appoint any Crime*

to be punish'd, they, at the same Time, grant all these Things without which it is impossible to prove it ; altho in other Cases this is not allow'd. And thus we find that the Servants are not regularly admitted in an *Accusation* as *Witnesses* in Behalf of their Masters, yet if any Man strikes a Master of a Family in his own House, or beats the Master of a Ship, in his own Ship, the Mildness and *Benignity* of the *Lam* (which by a friendly *Condescension* does always accommodate it self to our *Utility* and *Advantage*) has in this Point prudently remitted something of the Rigour of its own *Definitions* by allowing the Testimony of Servants, lest otherwise, through the Wickedness and Malice of the *Aggressor*, the injur'd *Party* should want sufficient Proof.

As to the other Argument, I answer that altho I can adduce *Presumptions* which

which are more infallible and convincing than any *Witnesses* in the World, because by a necessary Consequence they are drawn and deduc'd from the very *Bowels* of Nature, and so cannot possibly deceive us, as *Witnesses* very often do; insomuch that we only rely upon their Testimony, because we believe and *presume* that Men who are indifferent and unconcern'd *Spectators* will not easily be induc'd to damn their Souls for ever by committing so unaccountable a Piece of *Falshood* and Injustice; yet in our Case the *Probation* is not founded on bare *Presumptions*, but we have here a *positive Crime* clearly prov'd and made out, namely that this wicked Woman, as soon as she was deliver'd of her Child, hid it beneath the Bed-Cloaths, and left it in that Condition. Now it is plain beyond all Debate, that this was a surer and more effectual

Actual Method of killing this Infant, than if she had basely resolv'd to murder it by Poison or a Dagger. So that she is clearly convicted of this Crime by the infallible Dictates of Sense and Nature. In this Case we do not make use of a *Law* that is enacted, but one which is born with us : About this Matter we have not appointed a *Law* but receiv'd it with our *Breath* ; not because such a Villany does not deserve Death, but because no *Judge* that thinks otherwise, is worthy of Life. Would not voluntary and premeditated Murder be capitally punish'd, altho there were no *Law* among us enacted about it ? And was it not actually punish'd with Death, before there was any such *Constitution* made ? Altho we are not expressly forbidden to *suffocate* a Man, by any *capital Statute*, does not yet the *Julian Law* comprehend this Crime ;
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and tho some Nations have thought fit by *positive Statutes* to ordain that these Women, who in Time of Child-Birth call not for present Assistance, shall be punish'd with Death, we must not therefore conclude that those who have no such *Law* do entirely remit this Severity ; for these, albeit they have not enacted such a Law, do yet in their *Practice* as effectually provide against it, as they who have appointed an expresse *Statute* for this Purpose ; especially where the frequent Commission of the Crime, the Genius of the Age, and the Temper and Inclination of the People, (whereof we have the unhappy Experience among our selves) seem necessarily to require this just Severity. By which Considerations, those who lately discharg'd the same Trust, with which you are at present invested, did inflict a capital Punishment on one Woman of
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Perth-Shire, and another of *Lothian*, upon Account of this fatal Omission. And we have Infinite Reason to adore the over-ruling Providence of *Almighty God*, in the *Detection* of three others, who, for the like Crime are at present in close Confinement ; that so by the Remembrance of such a horrid Act, so lately committed, your Zeal and Resentment might be heightened and increas'd. But we are not limited by so narrow Circumstances ; for we accuse a wicked and barbarous Mother, *suffocating* and strangling her own Child ; to which heavy Charge the Neglect of necessary Assistance is only adjoin'd as an *Aggravation* of it.

Nor ought ye, *Gentlemen*, to be mov'd by the *Presumption* of natural Affection in a Mother, as if this were of more Weight and Consideration than all the *Presumptions* which I have adduc'd ; for she endeavour'd by

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Poison to hinder her self from proving a Mother ; and after she was one, took all possible Care to throw off the Kindness and Affection of a Mother by the execrable Murder of the Birth of her Womb. She could not hinder herself from being a Mother, but She soon appear'd entirely void of all *Maternal* Affection. This natural Love was all that the Poison could carry off, the Remainder whereof she stifled, together with her Child. What did those Women hear that savour'd of a Mother, who offer'd her their friendly Assistance when she was in Child-Birth ? What did these behold in her Countenance or Gesture who search'd with her for the Infant, through the Rivers and Church-Yards ? What do ye just now perceive your selves in her smiling and unconcerned Face, so vastly different from the *squalid* Appearance, and mourn-

mournful Looks of those that are depriv'd of their Children? Since therefore it did not avail this *Infant* that she was a Mother, let it not be any Advantage to the *Mother*, that she was so unhappily desirous of hindring her self from being one.

Gentlemen, I hope, you will pardon me, if I have dwelt too long upon this *Accusation*, which ought rather to be furnish'd with Tears than Words. Let us therefore take off our Eyes from so disagreeable and bloody an Object; since there is neither any such Defect in the Proofs I have adduc'd, or in your Knowledge of this Affair as requires a further Illustration. In this Case *Nature* will plead for her self, and more vigorously maintain her *Cause* in your Breasts, than it is possible for me to do at the Bar. She will present to your View the lovely Countenance of this murder'd Infant,

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smiling upon its barbarous Mother, in the very Commission of this horrid Act. She will shew you its trembling Lips the very Moment it was miserably expiring, and represent unto you in lively Colours the execrable Cruelty of this unnatural Woman. She will infallibly pronounce those guilty of the Dangers which from hence shall be deriv'd on Posterity, and the Murders of our Country-Men that are yet to be born, by whose *Cruel Clemency* this *Pannel* shall escape, if it is possible for her so to do ; terrifying your Eyes with the dreadful Sight, and stunning your Ears with the dismal and melancholy Groans of expiring Infants ; filling your Houses with Lamentations, and your Consciences with Terrors that shall never have an End.

Behave then, *Gentlemen*, as we expect from Persons of your Character and

and Reputation in the World, who, while you yet continue in a mortal State, have the happy Prospect of a glorious and blessed *Immortality*, and for whom Crowns of *Lawrel* are prepar'd in *Paradise* that shall never fade or decay, in Consideration of the many extraordinary Services ye have done your Country, by rescuing the Innocent from the devouring Jaws of their Oppressors, and subduing Vice and Impiety by the impartial Sentences which you pronounce. Do ye therefore take off the Mask from Lust, and remove the Edge of Cruelty, restore Equity to our *Judicatures*, and Safety to our *Country*.

T H E

From the Law of Nature.

and Reputation in the World, who
while you yet continue in a mortal

State, have the happy Prospect of a

The Second Pleading,

From the Law of

NATIONS.

*Whether by the Law of Nations, and
the Civil Law, a Ship is acquir'd by
bare Pursuit without actual Appre-
hension?*

MY Lord President, Neither the dread-
ful Surges of the foaming Ocean, nor
the Conduct and Bravery of the *Hol-
landers* in Maritime Affairs, encour-
ag'd by the Hopes of Glory and the
Prospect of Gain, were able to deter
my *Client* from committing himself,
and all that he had, to the Mercy of
the

the Faithless Sea, and from endeavouring to acquire Victory and Reputation to his Prince in a Ship which he had mann'd and furnish'd at his own Expences; accounting Glory better than Pay, and Constancy and Fidelity to his Sovereign's Interest, to be better than any Reward. And yet now that he has taken from the Enemy the Ship which cost him so much Toil and Labour, his Accusers more barbarous than the *Tempests*, and more cruel and malicious than the *Rocks*, do not only endeavour to deprive him of the Price of his Blood, but, at the same Time, unjustly attack his Fame and Reputation; and in the *Charge* which they manage against this faithful Subject, who was never wanting to his Prince or Country, upon any Occasion, either in Point of Piety, or Fidelity, or Valour, they defame him as a Pirate, who treacherously carried off

off a Ship that was pursu'd by one of his Majesty's Officers, and would in all Probability have fallen into his Hands. The Falshood and Injustice of which *Accusation* will easily appear from this Representation of the Affair.

Captain *Rankin*, in a Ship protected by his Majesty's Authority, was cruising along the Enemy's Coast; near which he discover'd a Vessel call'd the *Snail*, carrying the *Dutch* Colours, which at length he came up with, after a vigorous Pursuit of several Hours, and oblig'd to strike Sail, being only hinder'd from Boarding her by the sudden Approach of a *Man of War* that was proudly adorn'd with the Enemy's Flag. But assoon as our Commander discover'd it to be a *Friend*, he return'd to his Prize, and put some Mariners and Souldiers A-board it, by whom it was brought into *Scotland*, and there by the *High Ad-*

From the *Law of Nations.* 113

Admiral adjudged to him. So that we have in some Measure already gain'd our Point, notwithstanding all the *reclaiming* of our *Adversaries*, whose Arguments, in my Opinion, will not appear to have the greater Force, because by that supreme *Judge* they have already been *repell'd* and condemn'd.

My Lord, The Arguments of our *Adversaries*, whereby they charge this Sentence with Injustice do plainly arise from a quite different Narration of the *Matter of Fact*. For the *Man of War*, as they pretend, attack'd one of the Enemy's Ships, which was the *Convoy* of three *Merchant-men*, whereof the *Snail* was one; and during this Engagement, while those under Protection were endeavouring to make their Escape with all imaginable Celerity and Expedition: They accuse *Ranken* of treacherously carrying off one of them, which would certainly

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have become his Majesty's Prize. And were this allow'd, they say, it will come to pass, that nothing shall for the future fall to the King : For it will always be carried off by these mercenary Fighters, who sail after the *Men of War*, as we find in the Fable, *The Lyon is followed by the golden Wolf*. And when any of the Royal Fleet shall happen to attack one of the Enemy's Ships, they by Treachery robbing them of their Booty, will leave them Nothing but a bloody Victory, and an empty Triumph ; and so the Prize shall not be the Reward of Losses and Valour, but of hidden Treachery and secret Fraud.

My Lord, The second Argument of our *Adversaries*, as they tell us, is taken from the first Principles of the Civil Law ; in which we are told that it is not he who is first possess'd of a thing, but he who is first engag'd

in its Pursuit, that acquires a Title to it. So that if two Persons happen to discover a *Jewel* lying upon the Shore, he who first perceiv'd it and not he that first snatch'd it with his Hand shall be accounted the lawful Owner. And just so a Man who digs a Treasure will not lose his Right by the Interposition of another Person, who, (while the first is employ'd in the Search of the Thing) has the good Fortune to light upon it. Add to this, that in the hunting of wild Beasts, which has the nearest Resemblance of the violent Manner of Occupation that is used in War, *Trebatius* is of Opinion, (a) ' That the wild Beast becomes presently ours, and seems to be so as long as we continue our Pursuit; but that if we give over the Chase, it is no longer ours, but appertains to him that seizes it; and

(a) 5. ff. De Acquir. rer. dom.

' therefore, if in the mean Time,
 ' while we are pursuing our Game,
 ' another snatches it from us with a
 ' Design to acquire the Property of it
 ' to himself, he seems in our Judg-
 ' ment to be guilty of Theft. And
 altho' the Opinion of *Trebatius* is re-
 pudiated in that Law, yet that by the
 Law of Nations it is universally esta-
 blish'd, appears from *Minfingerus* (a)
 whose Words are these, ' Which O-
 ' pinion of *Trebatius* seems at this Time
 ' very much to obtain among Hun-
 ' ters ; for altho' I am not yet actual-
 ' ly in Possession of the wild Beast, yet
 ' it is not lawful for another to snatch
 ' it from me and treacherously to in-
 ' terpose when I am engag'd in the
 ' Pursuit. And this is also agree-
 able to the Sentiments of *Baldwin*, u-
 pon the same *Par.* ' For neither, says
 ' he, does the Opinion of *Trebatius*
 ' want

(a) Institut. L. 2. S. 13.

‘ want Reason to support it, since
 ‘ we ought not only to abstain
 ‘ from that which is anothers, but
 ‘ also from that which is just upon
 ‘ the Point of falling into his Hands, lest
 ‘ we deprive him of his pleasing Pro-
 ‘ spect, and invade his promising
 ‘ Hopes, which have probably cost
 ‘ him a great deal of Toil and La-
 ‘ bour. For who would not think it
 an intolerable Piece of Injustice that
 his Pains and Industry should be so
 much defeated and wearied out?
 Nor does this only obtain here, but
 even takes Place in *Jurisdictions*; for
 in them there is so much Room for
Prevention that he who first cited the
Criminal, and not he who first pro-
 nounced the Sentence is always sure to
 be prefer’d. For when once the
Judge has begun to prosecute his Right,
 he will not be prejudg’d by the *Emu-*
lation and Industry of a neighbouring
Jurisdiction. My

My Lord, The third Argument of our Adversaries is taken from the Rules of War : For since the *War* is carried on at the King's Expences, and the Laws of *Military* Discipline are constituted and enacted by him, he is always prefer'd in the Division of the Booty which is presum'd to be acquir'd by the publick Power and not a private Hand ; and therefore it always falls to the Share of the Republick, and the Prince ; Largeesses and Rewards being bestow'd upon the Souldiers and Allies according to their Merit and Bravery, and in Consideration of the eminent Services they have done the State. As *Grotius* informs us at length (a) : So that in the present Case, since *Rankin* has done Nothing, the Man of War being sufficient for the Victory, they affirm that he deserves Nothing for his Pains.

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(a) Lib. III Cap. 6,

But yet, *My Lord*, notwithstanding all these plausible Objections, I contend that this Prize ought to be *confirm'd* in Favour of my *Client*, and therefore do offer the following Arguments to your Lordship's Consideration. The Compilers of the *Civil Law*, endeavouring to establish the Property and Dominion of Things (that so these Things which are in their own Nature most valuable might have the surest and most durable Foundations) are of Opinion that the Dominion of things which we pursue, does not depend upon the wandering and uncertain Intention, but on our actual catching of them. (a) "Therefore wild Beasts, & Birds, and Fishes, and all living Creatures which are born in the Sea, Air, or Earth, as soon as any Person has catch'd them, do presently become his by the *Law* of

(a) § 12. Instit. de Rer. Div.

of Nations. (a) After the same Manner those things that are taken from the Enemy by the Law of Nations belong to them who catch them.

And (b) all living Creatures which are catch'd either in the Earth, Sea, or Air, do then appertain to those who take them. From which Places it plainly appears that the Laws were unwilling to expose the Measures and Foundations of Right and Dominion to the Humour of the Judge and to commit them to doubtful and uncertain Conjectures, lest by this Means, Witnesses should become Judges and Judges behave like Tyrants. For what looser Method of discovering the Truth can possibly be invented than to admit the *Deposition* of a Witness concerning the Probability of a Thing, and whether it was possible for the Ship to escape. And what

Credit

(a) S. 7. L. 5. ff. de acq. rer. Dom. (b) P. 1. l. 1. eod. tit.

Credit is here given to the Senses? Left therefore Judges should be at a Loss how to determine this Matter, they require in such Cases, *Corporal, Actual* and *Natural* Possession, which being subject to our Senses, can neither fail nor deceive us. And therefore (a) *Nerva* the Son says, 'That the Dominion of Things arises from *natural* Possession, and that the Effects of it remain in these Things which are taken in the Earth, Sea, or Air; for they immediately belong to them who first attain the Possession of them. Which Possession *Theophilus* calls *natural* Possession, when a Thing appertains to him who catches it.

And, as *Vinnius* observes, altho' a bare Inclination to take a Thing is sufficient to retain the Possession of it, yet it is absolutely necessary that there be a *corporal Occupation* and *natural Ap-*

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(a) L. 1. §. 1. ff. De acq. & amm. Poss.

prehension of it at first. Add to this,
 (a) ' That it is ordain'd, that a
 ' wild Boar, taken in my Net, does
 ' not belong unto me, altho' I am pos-
 ' sess'd of it, unless (as *Bart.* observes
 ' upon that Law) I actually take it
 ' with my own Hands.

The Words of the *Law* are these,
 ' A wild Boar chanc'd to fall into a
 ' Net which you had laid for Hun-
 ' ting, and when he was lying ham-
 ' per'd in it, I carry'd him off. Now,
 ' whether or not do I seem to have
 ' unjustly depriv'd you of your
 ' Boar ; and if you imagine you had
 ' any Title to him, suppose I had re-
 ' stor'd him his Liberty and let him
 ' loose into the Woods : Whether in
 ' this Case would he have continu'd
 ' yours or not ? And what *Action*
 ' could you have against me : Pray,
 ' whether an *Action in factum*. He an-

(a) In L. 55. ff. De acq. rer. Dom.

answer'd, let us consider the Net, because the *Case* alters, if I have plac'd it in publick or private Ground ; and if in private, whether in my own or in that of another Person ; and if in another's, whether I have laid it with the Consent of the Master of the Ground, or without his Permission. Besides, it ought to be consider'd, whether the *wild Boar* stuck so fast in the Net, that he could not possibly have extricated himself; or if by longer struggling, he might have disintangl'd himself from it. Upon the whole Matter, I am of Opinion, that if he had fallen into my Hands, he would have belong'd unto me ; but, if you had given him his natural Liberty, by that Means he would cease to be mine, but still I would have an *Action* against you upon your *Fact* and *Deed*. And there-

fore *Puffend.* (a) affirms, ' That
 ' *Movedables*, in Order to their becoming
 ' ours, stand in need of *corporal Appre-*
 ' *hension*, and ought to be remov'd from
 ' the Place in which they are, into our
 ' Custody and Possession : And there-
 ' fore the young ones of Birds, and
 ' Whelps of wild Beasts remaining in
 ' their Nests or Caves, do not become
 ' mine, altho' I have touch'd them,
 ' unless I actually remove them, and
 ' carry them home.

Secondly, *My Lord*, That natural
 Possession is requir'd, in order to
 attain Dominion, does not only ap-
 pear from these *positive Definitions*
 and several others, but also from the
 Reason which is assign'd for it in
 the Laws themselves. For since *Ap-*
prehension is a way of *acquiring* Domi-
 nion which descends from the *Law of*
Nature, it is reasonable that it should
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(a) De Jur. Nat. Cap. 6. §. 9.

be compleated by *corporal Possession* which is only accounted *natural* by the *Doctors*, as the Methods of acquiring, which descend from the *Civil Law* are also confirm'd & establish'd by *Civil Possession*. Besides, as the *Inst. (a)* & *Dig. 6.* inform us 'Many Things may happen and fall out, which may hinder the wild Beast from being taken. To which may be added what *Grotius* says, *Cap. 5. De mari libero.* 'After we had found out Property, says he, such a Law was made about it as imitated Nature. For as at first, the Use of Things was *exercis'd* by *corporal Application*; from whence we affirm, Property first arose, so it was thought convenient that by the like *Application* the Property of every Thing should be attain'd. This is what we call *Occupation*, which is a Word excellently accommodated to those Things

(a) De rer. div. §. 13. 6, L. 5.

‘ Things that were common before.
And in the same Chapter, *Grotius* tells
us, ‘ That *Occupation* in *Moveables* is
‘ *actual Apprehension*, and the *Applicati-*
‘ *on* of one Body to another.

And this is more fully explain’d by
Theophilus, “ For perhaps, *says he*,
‘ The wild Beast, which I had wound-
‘ ed did suddenly disappear, or hin-
‘ der’d me from advancing further;
‘ or while I was engag’d in the Pur-
‘ suit, I might chance to fall into so
‘ wild and uncultivated Places, that
‘ it would be impossible for me to fol-
‘ low out the Chace. All which does
excellently agree with true Philoso-
phy, right Reason, and the *purest*
Principles of the *Civil Law*. For how
can that be call’d ours which still en-
joys its natural Freedom. Nor is it
possible for two Men to be at once en-
tirely Masters of the same Thing : And
since as yet it either may be mine, or
may

may not, we ought to conclude that it does not belong unto me, *for the Conclusion should always follow the weaker Part.*

Thirdly, *My Lord*, If our Right and Property did not depend upon this Mark of acquir'd Dominion, demanding *actual* and *corporal Possession*, where could we possibly drop our Search and Inquiry? For all other Marks of Possession are very deceitful; so that when the Law preferring Certainty to Equity, requires exact and determin'd Rules, whereby all other Things, tho in their own Nature never so small and inconsiderable, may be precisely fix'd; yet Dominion and the Property of Things (which are Points of the greatest Moment and Importance) would be left doubtful and undetermin'd.

How could we without this Possession *adjudge* to the Souldier the Property

perty of his Booty, the wild Beast to the Hunter, a Jewel to the Finder, and a Treasure to the Person that diggs it ? But of all Things that can be *apprehended* there is Nothing more uncertain than a Prize taken at Sea, which therefore does most of all require *actual Possession*, where the Event like the Winds and Ocean, on which it depends, is doubtful and wavering. For how soon may the Sails, which a little while before were swell'd and full blown cleave to the Mast by a sudden Calm or be violently torn away from it by a dreadful Tempest. Nor is it improbable that the Ship it self may either lose its Way, by the Interposition of dark and lowering Clouds, or be unexpectedly sunk in the Waters by springing a secret Leak. Besides, an unhappy Quarrel among the Mariners may stop its Career ; or the Error of an ignorant Pilot may

may so divert its Course that the Passengers shall lose both their Hopes and Ship.

Fourthly, *My Lord*, I would think it necessary, that in *War*, more than in any other Sort of *Occupation*, Dominion and Property should be determin'd by certain Bounds. For who would expose his Life and Blood for so doubtful a Prize; since at this Rate he would have no other certain Purchase, than painful Wounds, and the clashing of Swords would be turn'd into Debates of *Law*? And how inconvenient would it be for the Publick that Souldiers, amidst the loud Noise of their Arms, and the shrill Clangour of their Trumpets should be distracted by the refin'd Nicetys, and Subtletys of the *Bar*? This would arm them against each other; and we cannot possibly imagine any Thing that more directly tends to the Prejudice of the

Common Wealth, than by these Difficulties to discourage Souldiers from pursuing the Enemy ; who would not endeavour to take them in their Flight, altho they were routed and dispers'd by their own Troops : And after the Merchant-Ships were scattered by the Royal Fleet, none of the Privateers would vigorously pursue them, being sensible they would gain no Prize to themselves by so doing. By which Reasons and Considerations our *Lawyers* have been induc'd to determine that every thing which is apprehended does, without any Manner of Distinction, appertain to him that takes it. And as *Alberic. Gentil. de Advocat.* (a) says, " Those things that are yet to be catch'd ought not to be look'd upon as already taken and gain'd from the Enemy. Nor was it ever doubted that these Souldiers should receive

(a) *Hispan. C. 4.*

receive the Ransom who have taken the Captives, altho others by routing and disperſing them were the Occaſion of their Flight. Nor is there any Kind of War, in which the Liberty of taking Priſoners ought to be further extended than in this which is managed and carried on by Subjects at their own Expences. And indeed a Sea Engagement is ſo bloody and terrible a Sight that this Liberty ought to be indulg'd them inſtead of Pay, and this Pay ſhould be augmented upon the Account of the Dangers to which they are expoſ'd. And it is certainly better to enrich the Subject by ſuch a Licence than among ſo many Subtletys and *Ambiguities* to ſuffer the Enemy to eſcape. Beſides, by a ſpecial Statute of Ja. 2. (b) it is provided in our Law, that no Man ſhall violently deprive a Souldier of his

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(b) Parl. 12. Cap. 53.

Captive, or any Thing he is possess'd of, which plainly shows that our Ancestors look'd upon Possession as the only infallible Mark of Dominion acquir'd in *War*, and understood it to be only so far acquir'd as the thing it self was actually possess'd.

Fifthly, *My Lord*, Altho' *actual* and *natural Possession* were not absolutely necessary, yet it cannot be deny'd that the first *Aggressor* ought then only to be preferr'd when the Pursuit is easy.

Instit. de rer. div. ' The Swarm of
 ' Bees also which flew out of your
 ' Hive is only understood to be yours,
 ' as long as they are within your
 ' View, and the Pursuit of them is
 ' not difficult, otherwise they apper-
 ' tain to him who has first the good
 ' Fortune to catch them." Upon
 which Account, the *Civilians* acknow-
 ledge, that the Difficulty of the Chase
 intirely cuts off all Hopes of Domini-
 on.

on. And this *Decision*, in my Opinion, has pleas'd our Lawyers, upon this Consideration, because it was more adviseable to suffer the Prize to fall into the Hands of one Subject than intirely to baffle their united Attempts, while every one of 'em was render'd uncertain and insecure of his Right. And if this Difficulty of Pursuit could transfer the Dominion, even of these Things which are our own, how much more can it hinder the *Acquisition* of those Things which still retain their Liberty and Freedom? In our Case it is evident, and shall be made out and *instructed*, by convincing Proofs, that this Ship could have escap'd and got out of the *Pursuer's* Reach, or at least, that the Pursuit of it was very difficult; for it sail'd faster than a Ship which is swifter than this, and he who overcomes the Man that has vanquish'd me, does in Effect overcome me also.

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Besides, the *Pursuer* was hinder'd by taking other Ships ; and if we'll be pleas'd to compare the Celerity and Expedition, with which this Prize first fled away, with the Distance at that Time between it and it's Shore ; it will plainly appear, that it was impossible for him to have render'd himself Master of her. And this further appear'd from the Testimony of some Mariners that belong to a Ship of our Allies the *French*, which beheld the Engagement. By which Proofs the *High Admiral* (whom we must needs allow to be the ablest Judge in these Matters) was so fully convinc'd, that he *adjudg'd* the Prize to Captain *Rankin* ; so that the Authority of a Sentence is added to the Arguments we have already adduc'd.

My Lord, As to the Arguments of our *Adversarys*, it is answer'd, that a treacherous Interposition does not
deprive

deprive one even of the Hopes of Dominion. I do indeed acknowledge that many Things are lawful in their own Nature, which we are not allow'd to do out of Spite and Malice to our Neighbour, and that Treachery does very much *vitate* a Man's Right and Title. And therefore the *Laws, Authoritys* and *Decisions*, adduc'd by our Adversaries; do not at all concern us, since they presuppose a treacherous Interposition, whereas we used no Fraud at all. We have nothing to do with the *Jewel* that was carried off by him who first perceiv'd it, nor with him who disappointed the wearied Industry of the first Hunter, nor with the *wild Beast* that was wounded at a Distance but not catch'd, since in our Case, the *Ship* did not receive any Shot of the Enemy. So that our *Adversarys* cannot be prefer'd unto us, even according to the Opinion of
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Trebatius (altho' it is *repudiated* by our Law) since the Prize had not sustain'd any Damage by their Cannon, which yet does not render a Ship so unfit for Flight as Wounds do a wild Beast. But such a Case would indeed somewhat concern us, if we suppose that two Persons, in different and opposite Roads, chance to discover the same *Jewel*, of which he would certainly acquire the Dominion who first took it up, altho' he perceiv'd it last. And 'tho he who was digging a Treasure & employ'd in its Search, would be mightily disappointed by the Interposition of one, who, being acquainted with his Design, and envying his good Fortune, should in the Night-time, or by any other secret Methods endeavour to prevent him : Yet it is beyond all Colour of Debate, that one who began to dig after him, and knew nothing of the Matter, but pierc'd through
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the opposite Part of the Wall, would acquire the Property of the Treasure; which has a very great Affinity with the present Case.

For we were so far from disappointing the Industry of another, that his Majesty's Ship was not within View of the Prize when *Rankin* attack'd it, but was at that Time employ'd in taking another Ship; insomuch that our Prize would in all Probability have escap'd, as appears from the Proofs we have already adduc'd. Nor has that Argument any Force which is taken from the *Prevention of Jurisdictions*; for in these neighbouring *Jurisdictions*, both of them have a previous Right of *Citation*: But this Right is deriv'd from *Priority of Diligence*; nor is it presupposed but acquir'd. And then the Testimony of *Grotius*, upon which our *Adversarys* so much rely, seems, in my Opinion,
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rather plainly to confirm than any way to weaken our Cause : For (a) he requires *natural Possession* in this *natural Way* of acquiring, and adduces the Laws I mention'd before ; and in *Numb. 4* he concludes, ' That any Kind of Possession is not sufficient, but that a firm and undoubted one is requir'd. And, which yet seems harder than any Thing I have advanc'd, *he tells us*, ' That these Ships only ought to be accounted lawful Prizes which are brought into our Ports and Harbours, or have continu'd in our Power for the Space of four and Twenty Hours." And altho' among those who serve for Pay, the Plunder belongs to the General ; yet it is unreasonable that this should obtain against these who get nothing for their Pay but the Prizes they take. And therefore, *Tract. de Maribus*, (b)

(a) In lib. 3. Cap. 6. Num. 42. (b) C. 4.

he very justly ridicules the Title which the *Portuguese* claim to the *Indies*, after this Manner : ' But if, to ' have sail'd thither before others, and, ' in some Measure, open'd the Way ' unto them, they call this *Occupation*. ' What can be more trifling & insigni- ' ficant than such a Pretence? Nor can we imagine a Case that has a nearer Resemblance of ours. So that, *My Lord*, these Gentlemen plead the Cause of the *Exchequer*, and we of the *Prince*: They endeavour to increase his Riches, which are often uneasy to the Subject, but we advance his Glory and Renown. And if the Case of the *Exchequer* is never so bad as under a good Prince, it is then certainly worst when the Rewards of Glory and Gratitude are brought into the *Tresury*. Happy and prosperous Government which is supported by *Judicatures*, that have more Regard to the Laws than to the

Exchequer! Princes are indebted to the *Laws* for every thing they possess, but by the Increase of the *Tresaury* Vices are too often maintain'd. And therefore with *Javolenus* (a), I conclude,
 ' That he is not much in the wrong,
 ' who in doubtful Cases does readily
 ' answer against the *Exchequer*.

(a) L. 10. ff. De jur. Fisc.

T H E
Third Pleading,

From the

C I V I L L A W.

*Whether the bare Attempt is Capitally
punish'd in the Crime of Assassination.*

MAY it please your Lordship, Let
us remove the *Splendor* of this
numerous Assembly, which this new
and surprizing Complication of Crimes
in the Person of the *Pannel* has invi-
ted thither ; the *Eloquence* of his *Ad-
vocates*, whom, much against their
own Inclination, your merciful Com-
mands

mands have oblig'd to undertake this unaccountable Defence : The *Popular Air* of those that seem to favour his Cause from the Spite and Malice they have conceiv'd at their Magistrates and Judges ; and we shall find this *Criminal* naked and expos'd, and loaded with so horrid a Villany, that every Circumstance of it without the Attendance of the rest, might by it self amount to a Crime : a *Clergy-man* handling Arms contrary to the *Cannons* of the Church, a *private Person* attacking a privy Counsellor against the Laws, a *Shepherd* feeding his Sheep, not with Milk, but with Blood, not satisfied with Manslaughter, but premeditated Murder ; not contented with a fore thought and contriv'd Villany, but a sacrilegious Crime ; so fond of Mischief, and so bold and greedy an Instrument of Wickedness, and so proper for the Commission of the most barbarous and
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unaccountable Actions, that he was not frightened from his Design by the sacred Character of the *Arch-Bishop*, whom he invaded, but in Presence of a numerous Multitude, and in the Face of the Sun he had the Impudence to attempt this open *Parricide* in the Streets of our Capital City. And yet if his Wickedness and Impiety had stopt here, he might have found the Clemency of his gracious Sovereign, even overcoming the Heinousness of his Crime; but this abominable Wretch, looking upon himself as unhappy in his *lucky* Disappointment, did frequently repeat the *absent Crime* in his transported Breast, and greedily insinuated to his accursed Brethren, how desirable, and, good God! How holy a thing it would be to destroy all the *Bishops* of our Church. He was once overcome by the dreadful Consciousness of his
Crime

Crime, and withdrew himself from the Punishment of it, by a sudden Flight into foreign Countries, but *God Almighty* brought him back, without any other Guards than divine Justice, that so the Severity of his Punishment might strike Terror into the Wicked, and comfort the Good, being inflicted upon him in the same Place where he committed the Crime. Horrid Impiety! Whose very Defence exceeds other Crimes; for to affirm that he was induc'd to perpetrate this execrable Villany by the Light of his Conscience, and the Influences of the *Holy Ghost* is in Effect to transfer the Guilt of it upon *God* himself, and to make the Avenger of Sin both the Sharer and Author of it, and is not only to commit the Crime, but to *canonize* it, and recommend the Commission of it to Posterity by the Hopes and Prospect of eternal Life. As if
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the Divine Majesty which is gloriously surrounded with so numerous Armies of Angels, either were not just, or too long delay'd the Execution of his Justice ; and therefore he ought to take up Arms, lest Truth and Sincerity be hidden and suppress'd. I am not ignorant that *God Almighty* inspir'd some under the *Old Testament* with a sacred Revenge and Resentment of Crimes, (in the *Jewish Theocracy*, when he himself was instead of a King unto that People) who are called *Zelotes*, and whose Power, to prevent the Delusion of their Country-Men was confirm'd by unusual Miracles. The first and most eminent Person among them was *Phinehas* ; but this Sect so polluted their Zeal by a Devotion that was warm'd and transported to a Degree of Madnels, and by committing, upon all Occasions, the most violent Actions of Rapine and

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Injustice

Injustice, that *Grotius Annot.* (a) tells
 ' us that the Boldness and Impu-
 ' dence of these People, whom *Jose-*
 ' *phus* calls *Zelotes*, daily increas'g did
 ' at length raise the Anger and Indig-
 ' nation of the *Romans* and prov'd
 ' fatal both to their Temple and Ci-
 ' ty. But after the *Incarnation* of our
 ' blessed Saviour, God Almighty did only
 make use of spiritual Arms, and when
 the Sons of *Zebedeus* call'd for Thun-
 der, *Jesus* answer'd them, *Ye know*
not what Manner of Spirit ye are of:
 And when *St. Peter* had unsheath'd
 his Sword in Behalf of the Saviour of
Mankind against the basest of Men.
 Christ himself who was *God-Man* re-
 jected that innocent Defence, which
 would have been the Effect of Anger
 and Repentment.

But, *My Lord*, Let us now manage
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(a) In Act. 7. & 57.

the Charge itself, in which we ought first to prove that the *Pannel* contriv'd the Death of the *Arch-Bishop* of St. *Andrews*; that in Order to put his *hellish* Design in Execution, he walk'd the Streets for a long Time with a Pistol about him, which he aim'd at that *Reverend Prelate*, while he sat in his Coach; but being struck and amaz'd with the Terror of his guilty Conscience, he discharg'd it with a trembling Hand, and wounded the *Bishop* of *Orkney* in the Arm, who was next to the *Arch-Bishop*; upon which he fell ill of a lingering Disease and died.

Now the *Probation* of these Crimes does not depend upon *Witnesses* or *remote* and deceitful *Presumptions*, but the *Confession* and Acknowledgement of the *Pannel* himself; and that not extorted from him by Racks and Torments, nor inadvertently falling from his Mouth by a Mistake, but

frequently repeated, and *adminiculat-*
ed by a great many pregnant Cir-
cumstances ; infomuch that this
Charge and Accusation of the most
hainous Crimes is made good and sup-
ported by the most convincing Proofs.

My Lord, That this Attempt, tho it
prov'd ineffectual, ought to be capital-
ly punish'd, I contend from this three-
fold Argument. First, Our Lawyers
agree that the Design ought to be as
severely punish'd as the Effect ; and
in more hainous Crimes, the bare At-
tempt is punish'd with Death, where
the *Criminal* did all that he could, and
carried on his Design to the utmost
Act. And this I believe, was intro-
duc'd as well in Favour of the Person
invaded, as in Prejudice of the Ag-
gressor. For the Laws, consulting
the Safety and Security of Mankind,
oppose the first Motions and Attempts
of Injustice, and have provided for

us at a Distance : Just as Men usually do, who preserve and protect any thing that is valuable by covering it with many Folds, or with a Wall or Seal : And since the Reason of punishing Crimes is not so much because such a Thing is done, as because the same Thing is always to be expected from the same Persons ; (the malicious Design remaining tho' it is not in Execution ;) the Laws in atrocious Crimes, have wisely and prudently subjected the bare Attempt to a determin'd Punishment, where the will and Inclination is of it self a Crime. And therefore the Emperours *Arcadius* and *Honorius*, ordain'd (a) *That the Design and Effect should be punish'd with the same Severity* ; and upon this Account they added in the same Law, *That the Laws have appointed it*, which we find translated in the *Basiliicks*, and
Paul.

(a) L. quisquis C. ad L- Jul. Ma.

Paul 51. Sent. 1. expressly says, That a Man's Design ought only to be punish'd and not his Actions. Now this particularly obtains in our Crime of Assassination; upon which Account a Murderer is defin'd to be one who walks with a Weapon upon Design of killing a Man. (a) And in this Crime the Will is more regarded than the Event. (b) And if the Laws of Infidels paid so much Respect to Mankind, having no other Guide than the Light of Nature, and the Dictates of Reason ; how much greater Care ought our Law-Givers and Judges to take, who are directed by divine Illumination, and know that Man was form'd and created after the Image of Almighty God? For since those who broke the Statues and Images of the Roman Emperors were condemn'd as guilty of Treason ; how much more severely do they deserve to be punish'd, who

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(a) L. 1. ff. ad L. Cor. de Sic. C. L. 14. ad L. Cor. de Sic.

endeavour, by *Murder*, to destroy the Image of the *King of Kings*. But of all Kinds of Murder, there is none, in which the bare Attempt does so much deserve to be punish'd as when a Conspiracy is form'd against the *King*, or the *Senators*, in whose Place his Majesty's *Counsellors* have now come ; who are therefore by the Emperors call'd a *Part of our Body*. And in this Case, the *bare Attempt* is capitally punish'd, as appears from *Matt.* (a) Besides, the Attempt is punish'd in all Crimes when they are arriv'd to the last *Act*. (b) And those who will seem milder on this Head, require only three Things. 1. That the Aggressor has advanc'd to the Step next to death. 2. That it be not his Fault, the Crime is not fully perpetrated. 3. That the Person invaded does only escape by Chance

(a) De Crim. Pag. 7. (b) Gothofred §. conatus cō. verr. in Clem. si furiosus Num. 6.

Chance. In those Cases, *My Lord*, it does a Man more Harm to have design'd the Crime, than it avails him not to have actually committed it. For altho', when the *Pannel* has not accomplish'd all that might have been perform'd; so that it does not appear whether he would have repented of it, or where he was just upon the Point of perpetrating the Crime, but presently repented and did not do it : Tho' I say in these Cases the *Judge* ought to be mollify'd and soften'd ; yet when the *Aggressor* maturely consider'd of the Murder in his own Breast, and accomplish'd every Thing that was in his Power, and not only carry'd a Pistol about him with that bloody and barbarous Intention, but with a great deal of Composure and Deliberation discharg'd it against his Majesty's *Counsellors* : Who can free such a Person from the Imputation of this horrid

rid Crime ? And then as to these Things which are objected against us, in Order to prove that an Attempt ought not to be capitally punish'd, they must needs be understood of the bare Endeavour, which did not arrive to the utmost Step, and not of the perfect or consummated Attempt, where the Malice of the *Aggressor* did all that was in his Power, altho' he was not able to effect every Thing he design'd. For this happy Disappointment is not owing to the *Pannel*, but to *God*. Nor does *God Almighty* afford his Favour and Protection to those wicked Persons, who have endeavour'd as much as possible to destroy his Image and violate his Laws ; for this would be to arm the Divine Providence against *God* himself. Neither do the Laws, by an *unjust* Clemency, protect those *Malefactors* who break and transgress them ; for this would be to preserve

wicked Men to be fatal Instruments of Mischief to Posterity ; that so after in one Piece of Villany they have miss'd their Aim, they may at length perfectly learn to commit it by frequent Endeavours & repeated Efforts. But, *My Lord*, altho the bare Attempt does not in every Capital Crime infer the highest Punishment, yet in that of *Assassination*, the *Doctors* unanimously agree, that the very Endeavour ought to be punish'd with Death. And this seems to have been introduc'd from a Detestation of Treachery; against which there is no Manner of Safety or Defence. The *Laws* are easily inclin'd to spare that sudden Enmity which arises from the Resentment of real and sensible Injuries, or even from the Colour and Shadow of an Affront: But they never pardon a base and unmanly Treachery, which has not the least favourable or imaginary Pretence

of Honour or Justice to support or excuse it. To which our Adversarys can return no other Answer than this, that it ought only to be accounted *Affassination* when the Murder is committed for some determin'd Price, and the *Malefactor* has taken Money for his Pains. And this they endeavour to prove from *Matthæus*, (a) affirming that it is introduc'd in this Crime, from a just Abhorrence of the abominable Wickedness and Covetousness of these mercenary Villains; especially since the *Saracens* hir'd these *Affassins*, (by Birth *Phenicians*) to the Destruction of *Christians*.

But I am not pleas'd with this weak Objection; for this particular Way of punishing the bare *Attempt* arises from the Detestation of the *Treachery* that attends it; and therefore, wherever this is found, the Punishment is

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(a) Tit. 5. Cap. 5. Num. 1. & Clar. c. Affassin.

incur'd. Nor is it of any Moment to the *Republick*, or the Members of it, whether by the Prospect of some Advantage that may redound to him from the Murder, or by the Hopes of Favour, or some determin'd Reward, the *Murderer* has been induc'd to *perpetrate* the Crime. And if the Nature of this Crime were strictly confin'd to the first Original and Occasion of it, *Phœnicians* only who endeavour'd to *Assassinate* a *Christian* would be capitally punish'd for the *bare Attempt*. But all this, *My Lord*, is directly contrary to Sense and Reason : For *Mattheus* himself discourses to this Purpose, ' That he is guilty of the Crime of ' *Assassination* who has kill'd a *Pagan* ; ' for the *Cornelian Law* regards humane Nature in general, and speaks ' not concerning any particular Set ' of Men, but has Mankind its self in ' View. And thus by retorting his

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Arguments, we may conclude, that
he is guilty of the Crime of *Assassination*, who treacherously murders a
Man, without distinguishing whether he was hir'd by Money, or induc'd to it by the Hopes of Favour, and the Prospect of a Reward. And that this Singularity does not proceed from the Hire, but the Treachery, appears from the same *Matthews*. (a)
Wherefore since our Ancestors have look'd upon that Murder, as the most hainous which is effected by Treachery; and seeing all fraudulent Designs are the Marks of a base and degenerated Mind; against which it is not easy to guard our selves, one may venture, upon just Grounds, to affirm, that in this Case the bare Attempt ought to be capitally punish'd. Yet this may be so qualified as only to take Place, when a
Man

Man carries on his Design to the utmost Act : As for Instance, you laid down treacherous Measures, and, like a Robber, waited for the Approach of your Neighbour by the Way-side ; but he had the good Fortune to escape the Snares you laid for him : In this Case there is Place for an *extraordinary* Punishment. But he inconsiderately precipitated himself into them, and you unexpectedly attack'd him behind his Back ; and he, beyond all Hope and Expectation, recover'd his Health : In this Case there will be Room for an *ordinary* Punishment. And since there are Persons who will be induc'd to commit Murder, either that they may acquire Reputation, and gain the Applause of the Vulgar ; or in Order to deserve *Heaven* for their Pains (being seduc'd and infatuated by *Heretical* Opinions)

it is more just and reasonable to affirm that *Criminals* ought to be condemn'd upon this Account, than because they are hir'd to do it by Money, of which very few Instances occur. For the stronger and more common the Occasion is of perpetrating a Crime, the more severely ought the Commission of it to be punish'd and restrain'd. Besides, in *L. 5. § ad L. Jul. majest.* we find these Words: Whoever contrives the Death of those illustrious Men, who are Members of our Council and our Court, or of *Senators* (for we look upon them also as a Part of our Body) or of any that are employ'd about our Person; whoever, I say, contrives their Death (for the Laws command the same Severity to be inflicted on the Inclination to commit the Crime as upon the Effect it self) he shall be capitally punish'd

' nish'd, and all his Goods confiscated
 ' and belong to the Exchequer.
 Which the *Greek Scholiast* does excellently translate *One that way-lays a Senator.* My Lord, as to the Customs of the *Romans* in this particular, we may learn them from *Quintilian* who (a) concludes, *You have done an Injury; but because it is committed against a Magistrate, you maybe justly charg'd with Treason.* And since the *Kings Counsellors* shine by the Splendour and Brightness of their *Sovereign's Rays*, and by a Fiction of Law are accounted a Part of his Body; (as *L. 5.* speaks) and in a *political* Sense are Members of the State, without whose Help and Assistance Nothing of Moment can be perform'd, it is reasonable that he who attacks a Counsellor should be punish'd after the same Manner as if he had offer'd Violence to the King him-

(a) De Orator. L. 5. C. 10,

himself. As he that hurts any Member of the Body is as severely punish'd as if he had wounded the Head. And by this Contrivance the Laws procure Respect and Veneration to those who are intrusted with the Execution of them, and secure them from the malicious Designs and rash Attempts of the *Vulgar*. But this Accusation is not only founded upon the *Civil Law*, but also on a *special Statute* of our own; for by 4 *Act. Parl. 16. Ja. VI.* the bare Attempt in invading and attacking any of his Majesty's Counsellors is punish'd with Death. Altho it is answer'd to this *Act*, that it only obtains when the Attack is made upon a *Counsellor*, while he is obeying the Orders of his Prince, as appears from the Statute it self. And therefore, since it is not the Attempt it self, but the *Quality* of it that *infers* Death; according to this Statute the *Quality* must needs be prov'd.

And this is evident from *Clarus* (a) when
 ' the Debate is about the inflicting a
 ' punishment, that is ordain'd by
 ' some *special Statute*, it is necessary
 ' that all the *Qualifications* concur which
 ' are express'd in it, and 4.2.5. *Num. 9.*
 ' When the Controversy is concer-
 ' ning the Imposition of a Penalty pre-
 ' scrib'd by some particular Act, it is
 ' requisite in this Case that all the
 ' Qualities be prov'd which are menti-
 ' on'd in the Statute, otherwise the
 ' Punishment shall not be incur'd.
 But, *My Lord*, the Force of this An-
 swer is easily remov'd, if we nicely
 consider the Matter. For the plain
 and obvious Reason why this Privi-
 ledge is granted to *Counsellors*, is, that
 the Laws may secure these Persons
 from Malice and Envy, whom the se-
 vere and impartial Execution of them,
 does so much expose unto it. And
 therefore this Statute ought to be in-
 ter-

(*) *Affaff. num. 2.*

terpreted in such a Manner as it may naturally produce this Effect. Now this cannot possibly be done, unless all those are capitally punish'd, who attempt the Crime; altho it is not prov'd that the Aggressors were induc'd to do so upon a publick Account. For since those Emotions are secret Acts of the Mind, which do not discover themselves in their Cause but in their Effect, they are *presum'd* to be done upon a publick Account, provided that this Attempt cannot be ascrib'd to any other Cause. As for Instance, suppose a Man were attempting to kill one of his *Majesty's Counsellors*, he would perhaps be heard if he reply'd, that a mortal and irreconcilable Enmity was between him and the Counsellor upon a private Grudge: But if there is any Colour of *Presumption*, that it proceeds from a publick Cause, as if he attack'd him when he was

discharging his Office and obeying the Orders of his Prince, then this *Quality* is understood by a *Presumption Juris & de Jure*, and is of the Number of those which may be alledg'd, but stand not in Need of *Probation*. And this also is deliver'd to us in the Remarks *ad Clarum* (a), where the *Qualities*, presum'd by Law, may be alledg'd without any other *Probation*. And *Mascard*, (b) does plainly inform us, that there is no Necessity of proving a *Quality* when it subsists in the Nature of the Thing. (c) And as, on the one Hand, this Statute would be very insignificant, if this did not obtain; for the *intrinsic Quality* can hardly be prov'd, and wicked Men might by a very specious Pretence, conceal their publick Resentment under the Appearance of a private Quarrel: So upon the other, no
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(a) 4. §. 5. Num. 17. (b) Conclus. 1284. or 3 (c) Alciat. presum. 3. Reg. Boet. Decis. 118.

Man ought to be displeas'd at this Interpretation, since it is his own Fault that he falls into this Inconveniency ; and he has no Body but himself to blame, who did that which he ought not to have done. Which Consideration does easily furnish us an Answer to the *Citations* adduc'd from *Clarus*, for they must needs be understood concerning these *Qualities* which inhance the Crime, and admit of *external* Proofs : As for Instance, a *Riot* committed in *Church* is aggravated by this Quality of it, and more severely punish'd ; and therefore this Circumstance ought to be prov'd *Fratricide*, is more hainous than ordinary Murder ; and therefore we must prove, that not only a Man, but a *Brother* was kill'd. But in our Case, *My Lord*, there are a great many concurring *Presumptions*, from which this *Quality* may be clearly infer'd. For this *Pannel* is of the
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Sect of Puritans, who have always maliciously oppos'd the *Episcopal Order*, and whose Writings very often incite People to destroy the *Bishops* as the Enemies of *Christ*; with which Doctrine the *Pannel* was not only infected himself, but also promis'd to all that were acquainted with him, that he would put his bloody Design in Execution: And, which is yet more unaccountable, did afterwards boast, that the Consideration which induc'd him so to do, was, that the *Arch-Bishop* of *St. Andrews*, whom he attack'd, had been the Occasion of the Deaths of some of his Brethren. Which Boast of his, altho' it did not precede the Action it self, does yet abundantly discover unto us the first Motive and Principle of it; especially considering that the *Pannel* cannot alledge any other Occasion of his barbarous Attempt, since he neither knew the *Arch-Bishop*, nor was known

known unto him ; being so pitiful and obscure a Fellow, that he was as much below his Notice as unworthy of his Regard or Observation. Since therefore, *My Lord*, Confession is the clearest of all Proofs, this *Pannel* cannot make any tolerable Defence, unless he retracts his Confession, and owns that he was guilty of an abominable Falshood, and impudently deceiv'd our Judges ; and except he has the Face to deny what he formerly acknowledg'd, and contends that his Confession is not valid, because it was *emitted* before an *incompetent* Judge ; since his Majesty's Privy Council, to which he disclos'd this Crime, is not invested with the Power of the Sword, nor allow'd to pass Sentence upon the Life and Death of the Subject. Which trifling Evasion does only more fully persuade me, that he is guilty of the Crime, whereof he

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is accus'd. And what is more reasonable, than that he who impudently boasted, that, by the *Guidance* of his Conscience, he committed this Crime, should be condemn'd by his own *Confession*, which ought always to be accounted the truest Discoverer and most infallible Interpreter of Conscience. *Confession*, says *Seneca*, (a) is the Voice of the Conscience. And if we may be allowed to consult the ancient *Fathers* upon this Head, who are the best Guides of Conscience, we shall find *St. Ambrose* instructing us to this Purpose in his 50th Sermon. 'A Man may be somewhat excusable whom another judges and condemns; but that Criminal has no Manner of Excuse who is condemn'd by the Sentence of his own Conscience. What can be juster (says *Tertullian* *ad Scapulam*.) that to condemn those

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(a) *Controvers. 8.*

guilty Persons who have acknowledged their Crime, and to force by Torments a Confession from those who obstinately deny it? This is that Confession which is *inspir'd* by Heaven, and *descends from Above*. Other Proofs are *elicited* by Men, but this is procur'd by God himself. But that I may return a more particular Answer in the precise Point of Law, I am of Opinion, that *that* Rule, or rather *Brocard*, which informs us, that *extrajudicial Confession*, or that which is *emitted* without the Bench (as Lawyers love to speak) is wholly ineffectual: This *Brocard*, I say, does in my Judgment only obtain, when the Person that *emitted* the Confession, did not behave in a serious Manner, jesting without any Care or Circumspection, and imagining, he would not be bound by any Thing he said; acknowledging no *Jurisdiction* in those, before whom

whom he made so little Scruple to confess his Crime. In which Case our Law was not willing to ly upon the Catch to insnare inadvertent People by their careless or boasting Behaviour, and to impute unto them the Mistake and Rashness of their Tongue for a Crime. But when one appears design'dly before the supreme Council of the Kingdom, (who by our Law have the Power of inquiring into Crimes) in Order to be examin'd by them, I positively affirm that the Confession which is there emitted, does bind the Person who makes it. For here the *Pannel* not only did know that his Life, was call'd in Question, which ought to have made him the more cautious; but also if this took Place, the Examination which the Law has committed to them, would be very ridiculous and insignificant. For to what Pur-

Purpose should he be examin'd, whom we cannot bind by this Examination? And since he who can examine, may also receive a Confession, I see no Reason, why his Majesty's Council should be call'd incompetent; since this Inquiry is committed to them by our Law. For whatever may be said, where the Confession is immediately retracted, and the Person that has rashly acknowledg'd his Crime can inform us of his Error, and prove that it proceeded from Inadvertency and Mistake; yet he is never heard when he cannot acquaint us with the true Cause and Occasion of the Error, he has committed. (a) But what need we say any more upon this Head? This Confession, emitted before his Majesty's *Commissioner* (who is invested with the regal Authority, and represents the Dignity and Splendor of

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(a) *Bols Tit. de Confess. Num. 64.*

his Prince) is equal to a Confession made before the *King* himself. And yet no Body doubts that one who confess'd in such a Manner might be capitally punish'd. Since the *King* has Power of Judging of Life, and Death, and can himself exercise that *Jurisdiction* which he has granted to others. Let us make a Supposition, which has some Resemblance of ours, and put the Case that the *Chancellour* of this Kingdom had been barbarously stabb'd with a great many Wounds and died of them; and that some Person who bore him a secret Grudge, when he was alive, and was accus'd of the Crime, had confess'd that he actually murder'd him; suppose that he boasted among his own People of the bloody Action he had committed, and being examin'd about this Crime before the *King* in his *Majesty's* Council, had strengthn'd and confirm'd his

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Confession : Who is so foolish or ignorant, as to affirm that this *Criminal* would not be bound by it, in Case he were not able to prove that he was either deceiv'd, or had lost his Senses?

My Lord, The last Refuge of the *Panel*, is that he was induc'd to make this *Confession*, by the Hopes of Pardon, and therefore his *Advocates* move in the Behalf of their *Client*, that he ought not to be severely punish'd, upon Account of such a *Confession* ; for they say, it is *unbecoming* the Character of a *Christian* Judge to break his Promise; *inconsistent* with the Majesty of the Government ; *lessens* the Authority of the Publick Faith ; and that *Nothing* is more contrary to a true and impartial Discovery of Crimes, than to recall a Pardon, by which *Confessions* are procur'd. And this they endeavour to confirm by the Authority of *Matthe-*

us, whose Words are these (a) "They make a Doubt, says he, whether a Confession elicited by the Promise of Impunity, and the Hopes of Pardon is sufficient to condemn the Criminal; I answer it is not sufficient; for altho' it is not in the Judge's Power, to promise Pardon, and consequently the Prince is not oblig'd by this unwarrantable Paction; yet the Confession was procur'd by Fraud, and that by this treacherous Means even the innocent may be insnar'd is evident from the Testimony of *Clarus*, who acknowledges that he would not condemn in that Case; and from the Authority of *Bossius*, who owns that it is safer not to condemn the Criminal to Death, since it cannot be deny'd that such a Confession is not so clear and unexceptionable as it ought to be. But, My Lord,

(a) Tit. de Conf. Num. 16.

Lord, Justice opposes, and the *Laws* contradict this Assertion. For *Confession* is the very Voice of Conscience, and infinitely surmounts all the Sentences in the World : And since the main Scope and Design of Probation is that the *Judge* may be perswaded of the Truth of what we affirm, who would not be convinc'd by a *Confession* which is emitted without any Manner of Constraint ; And altho the Hopes of Pardon had appear'd, yet this Consideration does not lessen the Crime, Nor does that Person, from one that was guilty, become innocent who has once confess'd himself so to be : And therefore since the innocent ought only to be absolv'd, Who can free him, who has confess'd the Crime, since he cannot say, that he is innocent of it ? But,

Secondly, *My Lord*, I answer that no *Judge* can absolve a *Criminal*, since it

it is the Royal *Prerogative* to pardon a Crime ; and if the procuring a Confession by the Hopes of Pardon may pass for a Remission, there is not a Judge of the lowest Rank and most inferiour Jurisdiction, who would not have the Power of forgiving Crimes, since he can receive these Confessions. By which Argument, *Bossius* is induc'd to be of my Opinion, *Lib. de Conf. Num. 12.* And altho a Confession, *elicited* by the Hopes of Pardon, may be said to be *shadow'd* and imperfect, where Threatnings are interpos'd; or the Innocence of the Party can otherwise be prov'd ; yet none of these is affirm'd or can possibly be said to have happen'd in this Case.

Thirdly, *My Lord*, Altho' a Confession, procur'd by the Hopes of Pardon, should be allow'd to free a Man from Death ; yet this would only ob-

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(a) *Lib. de Conf. Num. 12.*

tain when the Prospect of Forgiveness has *preceded* the Acknowledgement of the Crime. But if the *Panel* confess'd before they treated or agreed about the Hopes of Pardon, it necessarily follows, that this *Confession* was not obtain'd by the Prospect of it. And since the Suspicion of this *Confession* proceeds from these Enticements that went before it, because it is probable that he who confess'd did not discover the Truth, but may be *presum'd* to have only done it to the End that he might redeem himself by a certain Hope from the Result and Event of a doubtful Plea: It therefore, in my Opinion naturally follows, that this Confession ought not to be accounted imperfect, which, without the Assistance either of tormenting Racks, or enticeing Allurements was *emitted* freely and without any *previous* Agreement, which has happen'd in

the present Case, where it cannot be prov'd that any Hopes of Life were offer'd to the *Pannel* before his Confession, or that it was preceded by any Paction or Agreement. For this not only appears from the Confession it self, which was made without any Manner of Condition, but also from the Oath of all the *Judges* who manag'd the Examination, to wit, that the *Pannel*, not only confess'd the Crime without any Constraint, but was induc'd to do it by the secret Consciousness of his Guilt, with bended Knees and Hands lifted up to Heaven, without any Hopes of Pardon offer'd to him, or any Intreaty made to that Effect. So that, *My Lord*, by his *first Confession*, a Right being acquir'd to the King and the Publick, whatever was afterwards indulg'd, cannot be call'd a *Quality* of the *Confession*, but a Pardon of the Crime; and it must needs

be allow'd, that the Remission of Crimes depends upon his Majesty alone. Now to what Purpose do our Adversarys contend, that a *Quality* cannot be separated and divided from the *Confession*, since the *Confession* it self has no *Quality* annex'd to it; since no Hope of Pardon, no Promise of Impunity is contain'd in it: And then as to the *Act* of the *Privy Council*, in which this Prospect of Pardon is said to be comprehended, an Answer is very easy and obvious; for that *Act* did not precede the *Confession*, and consequently the *Pannel* did not confess his Crime, in Hopes of obtaining the Pardon which is express'd in it. But that this impertinent *Sophism* may intirely be remoy'd, and the very Foundations of it destroy'd, I shall make bold to acquaint your Lordships, that the *Pannel* never propos'd to himself the Hopes of Pardon, and that they who

examin'd him, never offer'd it unto him: But that afterwards, lest the false Report of this Hope should too much prepossess your Lordships in Behalf of the *Pannel*, or might occasion any Umbrage or Suspicion in this Court, his Majesty's Counsellors thought fit to publish this *Edict*, in which the Hopes of Pardon which were afterwards indulg'd are only narrated in a transient Way: And in the *Act* it self, they conclude that the *Pannel* has lost the Benefit of it, because in this Court he retracted his *Confession*; since no Hopes of Pardon were decreed unto him, if he deny'd what he had formerly acknowledg'd, that he might be wholly absolv'd; but that by the Repetition of his *Confession*, an Arbitrary Sentence might be confirm'd against him. So that neither was Pardon the Intention of the *Act*, since we ought not to found any Arguments upon *Edict*.

dicts beyond their true Scope and Design, nor in any Act can those Things which are connected be separated, as our Adversarys are pleased to alledge. My Lord, no Lawyer was ever so mad, as to affirm, that Confession is of it self ineffectual, when it is procur'd by the Hopes of Pardon, if the Pannel was convicted by other Proofs; for these remove the Suspicion and Presumption that arises from the Allurements and Circumventions of the Judge. (a) And in this Case, Presumptions that are strong and pregnant oppress the Pannel, who confess'd freely and without any preceeding Hopes or Prospect of Pardon. But in our particular Fact, there was never any other Person accus'd of this Crime, and this Man was accounted guilty of it by the publick Suffrages and unanimous

(a) Jur. Char. Quest. 55. Num. 9. Cui. l. Present. c. de his qui ad Eccles. confugiunt. Alciat. in l. Nat. §. de verb. signif,

mous Consent of the People. This is the Man, who by a conscious Flight has confess'd himself Guilty of the Crime, being only pursu'd by the Terrors of a distracted Mind. This is he, who arm'd with the same Pistol which gave these fatal Wounds, walk'd always *incognito*, and among unarm'd Persons, contrary, not only to the Customs of his Country, but also to the Practice of those of his Profession. And when he was apprehended by the Guards that were employ'd in his Pursuit, he utter'd with a faltering Voice so many impertinent, and senseless, and incoherent Things that the Beholders were easily perswaded that he only was guilty of the Crime. And when he underwent his publick Tryal, he related to those who examin'd him, all the particular Circumstances of this Action so accurately and distinctly (when once he thought
fit

fit to disclose them) that no Man, for the future, can entertain any Manner of Doubt, about the Author of it. Add to all this, that he frequently boasted of what he had done : By which single Proof *David*, the meekest Prince that ever liv'd, was induc'd to punish the *Amalekite* with Death. And altho' no *preceeding* Malice appear'd, yet this *Delinquent* is known to have hated these whom he attack'd, to have long before contriv'd their Death, and like a *Herauld*, incited People as much as possible to the *Perpetration* of this horrid Crime. Ought we not then to conclude, that this *Confession* which is voluntary, in every Respect, *adminiculated* by so many strong *Presumptions*, and so often repeated; nor in the least weaken'd by any contrary Argument : May we not I say, safely conclude, that such a *Confession* is abundantly valid and effectual

Equal to *infer* the Death of one, who by the silent *Suffrages* of his own Party, has already been judg'd unworthy of breathing this *Vital Air*.

My Lord, If we were so unaccountably mad, as to commit the Power of the Sword, to the Rabble and Refuse of Mankind, who either impiously pretend to Religion or instead of it are possess'd with Madness and Enthusiasm, what Measure would there be of Blood, and Slaughter, and what End or Period could we expect to be put unto it? Our Streets would daily be overrun with a *Deluge* of Blood, the Air would resound with the miserable Groans and Lamentations of the distressed, and we would not only fall *Victims* to that Popular Fury unre- veng'd, but even unprepar'd; while we should not be allow'd Time or Leisure sufficiently to provide either for our Children, or Posterity, or E-
state.

State. The more intent any Man were upon the Worship of God, and the Safety of the Common-Wealth; the sooner would he be murder'd by those bloody Enemies of God and his Country, and the Sword which has already so fiercely rag'd against his *Majesty's Counsellors*, when once it were elevated with Success, and accustom'd to Cruelty, would soon be unheath'd upon the King himself, whose *Members* they are accounted in a political Sense. So that the Scope and Substance of all our most earnest Petitions to your *Lordships* at this Time is, that ye would not suffer our holy Religion to be polluted with our Blood, nor *that* to be turn'd to the Destruction of Mankind, which was design'd and invented for a Remedy to humane Nature, and that *that* may not serve to deface the Image of *Almighty God*, which was contriv'd to the

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End it might be restor'd and revived.
your *Lordships* may be pleas'd to remember those unhappy Times, in which *Germany* was so severely rent and torn assunder by the Fury of the *Knaperdolians*. For they, from the same scurvy Beginnings, arriv'd to so prodigious and unaccountable a Pitch of Madness, that they beheaded their Wives in the open Mercat-Place, in Obedience, as they pretended to the Dictates and Commands of the *Holy Ghost*. Your *Lordships*, may therefore at this Time chuse whether you will imitate the mistaken Zeal of *Peter*, or the Example of our *Blessed Saviour*, the infallible *Jesus*; whether you will follow the furious *Knaperdolians*, or both the *Laws* of all Nations and the *municipal Statutes* of your native Country.

THE

T H E

Fourth Pleading,

From the

FEUDAL LAW.

*For Sir Thomas Dalzel of Bins, against
the Lady Caldwell.*

Whether upon the Subvassals, being condemn'd for Rebellion, the Few so returns to the King, that he is not oblig'd to pay the Subvassal's Debts.

My Lord President,

THE Rebels in the Year 1666, being intirely routed by the Bravery and Conduct of General Dalzel,

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who

who commanded his Majesty's Forces, he was rewarded, in Consideration of his eminent Services, with the Estate of *Caldwel*; which by this Rebellion, fell to the King. While he is receiving the Incomes of it, he meets with some Opposition from the *Relict* of the Party condemn'd, who contends that the Lands are her's, and cannot be claim'd by the *Fisk*, since her Husband did not hold them of the King, but of the Earl of *Eglington*; and seeing he had not been his Majesty's *Vassal*, they ought not to be confiscated to the King, but should belong to him who is the *immediate Superior* from whom she her self had obtain'd *Confirmation*. And altho' the Right of the guilty *Vassal*, does by Rebellion fall to the King, yet it ought still to devolve with the Burden of that Right which he had transmitted to her; since here his Majesty succeeds in Regard

gard of his Crown, by his common and universal Title, as he is King, but not as *Lord* and *Superior* by a *Feudal* Right. Between which ways of succeeding, she affirms, there is this considerable Difference, that when the *Few* returns in the *Feudal* Way, in that Case it must needs be acknowledged, the *Few* returns to the *Superior*, in the same Condition it was in, when it proceeded from him; and he is not oblig'd to own any Debts, except those which he knows, and (as we speak) has ratify'd and confirm'd; since this is essential to the Nature of a *Few*, and is plainly ordain'd by the *Feudal* Law. But when the King succeeds by the Right of his Crown, the Succession is so restricted by the Common Law, that his Majesty acquires nothing but what belong'd to the *Vassal* himself, and is affected with those Debts, wherewith he was burden'd: For (says she) the
Feudal

Fewdal Priviledges were utterly unknown to the *Civil Law*, whose Compilers, having nothing but Justice and Equity in their View, did wisely ordain that the Successor should not be capable of acquiring any thing which was not *competent* to the Person in whose Place he came ; that the Crime of Treason is not *Fewdal*, but descends from the *Civil Law* : And since in all other Cases, where the King succeeds by a common Right, he is always bound to acknowledge the Debts and perform the *Deeds* of the Rebel, as in *Escheats* and other *Allodial* Goods, why should it not also here take Place, where he succeeds in the same Manner ?

Secondly, A *Subvassal* (says the) is not the King's *Vassal*. For the vassal of my *Vassal* is not my *Vassal* by the *Fewdal Law*. *Vult.* (a) nor can he

(a) L. 1. Feud. C. 10. Specul. Tit. de Feud. §. 2. ver. 14.

he exercise the Fewdal Rights upon a Sub-vassal, *Hern. & Belv. (a)* And consequently cannot force the Subvassal to serve him. (b) Nor does the Subvassal swear an Oath of Fidelity to him; (c) nor ought he to demand from him the renewing of his Few. And therefore, since there is no Fewdal Tye between the first direct Superior and the Subvassal, the Few cannot return in a Fewdal Way; nor does the King succeed by a Fewdal Title, but by the Right of his Crown.

Thirdly, Nothing is so far remote from Law, and so directly contrary to the Principles of Equity and Justice, as that the Innocent should be punish'd for the Fault of another Person: But Innocence it self would certainly be oppress'd, if the Subvassal were depriv'd of his Few for the Crime of

(a) In Cod. 1. §. fin. De controver. Feud. (b) Khol. de Subm. feud. C. 4. Num. 38. (c) Schrad. 6. Feud. 18.

of his *Superior*, when perhaps he fought against his Master in the Service of his Sovereign, and a contrary Decision would give too great Incitement, and furnish too specious Pretences to Rebellion; For the *Subvassal*, perceiving that he shall infallibly perish by the Forfeiture of his *Superior*, will endeavour, by all imaginable Methods, to prevent his Ruine, and seek that Security from his own Valour, while he assists his *Superior* in his Rebellion, which the Laws would deny him if he help'd his Prince.

Fourthly, Among us this more clearly appears, from this Consideration, that when the *Few* of the *Subvassal* falls to the Exchequer, the King does not immediatly transfer it to the *Donatar*, as if it properly appertain'd to the *Fisk*, but makes a *Presentation* in Behalf of some Person, in which he offers the *Subvassal* to his *Superiour*. And this Way

Way of *evacuating* this Right, as directly contrary to proper *Devolution* is deliver'd in *Act. 2. Parl. 9. Ja. VI.* By which Law it is provided that the *Few* of the *Subvassal* shall return to the King : Which shows that this *Few* devolves in a *Feudal Way*, and therefore his Majesty is not oblig'd to pay the Debts of the Rebel. For when the *Few* returns by a *Fewdal Right*, the *Dominion* is *consolidated* with the Property, and the *Superior* is only bound to acknowledge those Rights which he has himself confirm'd. Now the Scope and Design of this Statute, is that the *Few* of the *Subvassal* should return, but not in the same Manner as that of the *Vassal* does ; and that the King can *present* to the *direct Superior* of the Rebel another *Subvassal*, who may succeed to all the Rights that were *competent* to the *Subvassal* before he was guilty of high Treason :

And since the Right of the Rebel's *Relict* did not belong unto him, neither does this Statute suffer it to appertain to the Person whom his Majesty has *presented*.

Fifthly, From the same Statute it appears that the *Subvassals* of the forfeited *Vassal* are not oblig'd to *exhibite* their *Writs* and *Evidences* of the *Few* of their Lands, and of their yearly Incomes, to those that are *presented* by the King; lest otherwise the innocent *Subvassal* might be oppress'd, and by the Fraud and Obstinacy of the Superior, that despair'd of his Safety, these *Writs* should be remov'd to the Prejudice of the *Subvassal*, who is secur'd by the producing of them; which would be unnecessary if the Right of the *Subvassal* did by the Forfeiture belong to the King.

Sixthly, Altho these Advantages have often been acquir'd to the King
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by Forfeiture, yet we never find it decided that his Majesty excluded the *Subvassals*; which we should infallibly have more frequently met with, if it had been any Way encourag'd or countenanc'd by our Law. But far be it from your Lordship's Intention to suffer by these trifling Arguments (which do now first appear in Publick, and to the Simplicity of our Ancestors were utterly unknown) the ancient Prerogatives of our Prince, and our Government to be overturned and infring'd. And that we may at one View behold the whole Scheme and Constitution both of our own and the *Fewdal Law*, we must first remember that *Fews* at the Beginning were voluntary and gratuitous Gifts, granted by the *Superiour* who was absolute *Proprietor* of them, upon Condition of Fidelity and Services to be perform'd; and when the *Superiour* had made

Choice of a fit Person, to whose Honesty he might securely commit himself, it was the justest Thing imaginable that the *Vassal* should not be allow'd to *alienate* the *Few*, and that it should return to the *Superiour*, burden'd with no *Debts* or *Pactions*, to which the *Proprietor* had not given his voluntary Consent. From whence we may safely conclude that it is inherent to the Nature of the *Few* that into whose soever Hand it comes, the *Vassal* cannot affect it with any *Subinfeudation* against the *Superiour's* Will, and that it ought to return to the Donor after the same Manner, in which it proceeded from him. Nor can it to any Man seem just or reasonable that this gratuitous *Few*, which was granted, in Consideration of Services to be perform'd ought to be transfer'd to others with whom either the *Superiour* is not at all acquainted or
whom

whom he knows to be his most violent Enemies. Nor should we accuse the Law of too rigid a Severity in this Point; for who would confer Benefits on other Conditions, or be such a Fool as to refuse them upon these? And if the *Subvassal* did not foresee this Inconveniency, and provide against it, it was not the Law but himself that did him this Piece of Disservice.

Secondly, My Lord, Since the *Fewdal Law* has strictly forbidden all *Alienation* that is made against the Will or without the Knowledge of the *direct Proprietor* or *Superiour*, it has permitted *Subinfewdation* to be no otherwise constituted than upon the Conditions of the first *Few*, as our Country-Man *Craig* tells us: (a) And that his Interest may be the better secur'd, he acquires by this *Subinfewdation* a new *Vassal*, whose

whose Services he may make Use of, as often as he sees Occasion ; upon which Terms *Subinfewdation* is admitted, altho *Alienation* is rejected, as we are inform'd by *Vultei* (a) & *Knoll*. (b) from whence *Hottomannus* makes this judicious Remark, *that the Condition of the Vassal is very unhappy, who is not only subject to this immediate Superior but also to the first.* And unless this were allow'd, it would be unnecessary and ridiculous to admit *Subinfewdation*, and reject *Alienation*. But yet when once we have admitted it, it would be much more absurd to allow *Subinfewdation* in such a Manner that the *Subvassal* could enjoy his *Underfew*, when the first Vassal was condemn'd for Treason, and might retain it, altho he had neither obtain'd the Approbation nor the Confirmation of

(a) l. 1. Cap. 1. Num. 149, (b) in €. 1. qual. olim feud. alien. pot. & Gloss. ad s. præterea hoc Cap. (c) in s. illud quoq, 5. Cap. imper. de prohib. feud.

of his first *Superior*. For this is not to have two *Vassals* as *Duarenus* acknowledges (a) if both of them are bound by the same Conditions ; nor is there any fuller Provision made for him, if in the one Case the *Few* returns pure and free, and in the other no otherwise than with the Burden of the Debts and *Alienations* of the *Vassal*. And from hence also we may conclude that the *Fewdal* Tye is found between the first *Superiour* and the *Subvassal*, which Obligation betwixt them does evidently Appear from the new *Form* of the Oath of Fidelity, prescrib'd in *L. 2 Fewd. Tit. 7. I will be faithfull to my Superior Caius against all other Superiors except the Emperour and the King.* And among us, as also by the Common Law of *Fews*, if the *immediate Superior* forbears to enter upon his *Few* ; the *Subvassal*, may by a *Fewdal Gradation*,

(a) De Feud. l. 12. Num. 12.

ascend to the King as to his first *Superior* and become his *Vassal*; which also obtains among us, when a Man, upon acquiring the *Superiority* or *Dominion* of his *Few*, imagines he cannot possibly get *Infesment* of it. Now this could not be done if there were not a *Fewdal* Tye between the King and the *Subvassal*, and if those who are our *Vassals* were not the *Vassals* of our Prince.

Thirdly, My Lord, The Crime of Treason is a *Fewdal Delinquency*, and one of the most hainous of them; for we cannot possibly imagine a Crime which is more directly contrary to the Fidelity and Alledgiance of the *Vassal*. So that why others should be accounted *Fewdal Crimes*, and not this there can no reasonable Cause be assign'd. Nay, we are assur'd that by the *Fewdal Law* this *Confiscation* of the *Few* of Rebels, was introduc'd upon this

Con-

Consideration, that the *Superior* might have the *Few* to comfort him, and make all possible Reparation to the Crime. For all imaginable Care is to be taken to make up the Loss of the *Superior* against whom the Crime is committed, that so some Satisfaction may be given him for the Injury done him, and the Dammage he has sustain'd.

And this Method of proceeding in Law (a), which was the first Cause of losing the *Few*, (b) is confirm'd by these Words. ' It has been doubted, ' whether, upon the *Vassal's* being unjustly depriv'd of his *Few*, the Advantage of it belongs to the *Superior* or ' to the Successor of the *Vassal* ; but ' this Distinction is both agreeable ' to Reason, and approv'd by Custom, ' that if a *Vassal* commits such a Crime ' against his *Superior*, as to deserve

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' to

(a) L. 2, Eeud. Tit. (b) Feud. s.

' to lose his *Few*, the Advantage of it
 ' ought not to redound to his nearest
 ' *Relations*, but to his *Superior*, that
 ' he may at least have some *Repara-*
 ' *tion* for the Injury he has suffer'd.
 So that if we consider the Substance
 of this Law, we find it deliver'd as a
 Rule unto us, that wherever the
Superior is principally offended, by the
 Crime of the *Vassal*, there the *Few*
 ought to return to the *Superior*, that he
 may at least have some Satisfaction
 for the Injury done him: But in the
 Crime of Treason, the King is offen-
 ded and not the *immediate Superior*;
 and therefore his Majesty has Title
 to the *Few*. And this Principle is al-
 ways receiv'd in other *Definitions* of
 Law; for the Virgin that is set a-
 part for God, is comforted after her
 Rape with the Goods of the Person
 who ravish'd her, (a) and the Porti-
 on

(a) 1. raptores c. de Epist. & cler.

on is return'd to the Father to comfort him for the Loss of his Daughter who deceas'd in Marriage, that he might not at the same Time be afflicted with the double Loss of his Daughter and his Money. (a) Secondly, if by this Law the Superior is prefer'd to the Brothers, as a Piece of Revenge and Satisfaction for the Injury committed by the Vassal; and consequently upon this Account, the sacred Tyes of Consanguinity are broken and violated; much more ought the King, who is the first Author of the Few, to be prefer'd to his Vassal, who is the immediate Superior, and is not injur'd. Our Countryman Craig also informs us, (b) That this Principle of the Fewdal Law does generally obtain; where after he has illustrated this Fundamental Point, he concludes, From whence, says he, 'It necessarily follows, that in

C c 2

' this

(a) Succursum ff. De Jur. dot. (b) Pag. 373.

' this Case the *Few* ought to return
 ' to him against whom the Crime is
 ' committed; And since the Crime
 ' of Treason is committed against the
 ' King; according to the very Rules
 ' of the *Femdal* Law, it ought to re-
 ' turn unto him. And, that this is the
 Opinion of the *French* Lawyers, ap-
 pears from these Words: '*Les droits*
Feudeaux ont seulement ordonne' que le Vas-
sal perd son fief, lors qu'il a offense le delict
n'est contre Luy & par Consequence la Con-
fiscation ne luy appartient, mais au Prince
pour reparation d'offense commise contre sa
Majeste, pour Reverence de laquelle tous
les Docteurs limitent les statuts qui veu-
lent que la Confiscation appartient aux seig-
neurs de fiefs qui n'ayent lieu au Crime de
Leze Majeste. (a) In *English* thus, 'The
 ' *Femdal* Laws have only ordain'd, that
 ' the *Few* should belong to the immedi-
 ' ate *Superiour*, when he is offended by the

(a) Specul. tit. De Homagio est fidel. s. quoniam
 Num. 63. Oldrad. concil. 17. Guid. Pap. Quest. 341.

Vassal; but the Crime of Treason is not committed against him, and consequently the Confiscation does not belong unto him, but to the King, who alone is capable of being offended by this Crime. And therefore the *Doctors* have thought fit to restrict the Statutes which ordain in general Terms, That the *Few* confiscated appertains to the *immediate Superior*. So that if the *Doctors* were of this Opinion, when the Statutes seem'd to favour the *immediate Superiors*; much more ought your Lordship to decide this Affair for his Majesty, when our own Statutes do not in the least contradict or oppose us.

Fourthly, My Lord, If the *Fewdal* Law had otherwise ordain'd, it would have intirely subverted its own Principles. For if the *Few* had return'd to the *immediate Superior* and not to the King, against whom the Crime was

committed, then that *immediate Superior*, would be in Condition by treacherous and hidden *Collusion* to preserve the *Few* to the *Rebel*, and transmit it to his Posterity; so that the Crime would not be punish'd, and the *Few* would be possess'd by the Enemies of the first *Superior*, and an infectious Race of his inveterate Oppressors. By this Means also all lawful Tyes and Allegiances would be intirely inverted: For the *Subvassal*, and almost every Subject, would not depend on the King, but upon those *immediate Superiors*, and would act in Obedience to their Orders, and not to the Commands of their Prince; they would assist them in Battle, and furnish 'em their Votes in Time of Peace; and in short, they would always be sure to be faithful to those Persons, to whom the *Few* might possibly belong. Besides, those Creditors who lent Money to the
De-

Debtor when he was engag'd in the Rebellion, and perhaps, in Order to advance his treacherous Designs, would by this Artifice disappoint the Exchequer, altho' the Law has intirely excluded them ; that so this Crime, which in Order to the perpetrating of it, requires Money (the Sinews of War) might be depriv'd of its Nourishment ; and that the Superior might not be burden'd with Debt, which perhaps was contracted to his Ruine and Destruction.

Fifthly, My Lord, If by the Crime of the Subvassal the Few devolv'd to the immediate Superior ; then it is plain, the Superior would not be bound to make good the Deeds of the Subvassal, and consequently, if by the Vassal's Non-entry a Right were acquir'd to the Superior, he would not be burden'd by this Subinfeudation of the Rebel's Relict. So that what Reason can properly be

be assign'd why the *Superior* is not bound in a smaller Crime ; when yet he is oblig'd, where a Right is procur'd to him by *Rebellion*, which is the greatest Crime in the World, I must confess, I cannot easily perceive. And since the King succeeds by this Crime as other *intermediate Superiors* do by other Delinquencys, it naturally follows, that since they are not bound to acknowledge the Debts of the *Vassal*, either is he obliged so to do.

Sixtly, That the *Few* of the *Subvassal* should return to the King, does not only arise from the *Fewdal* Tye, but also from the Principles of the Law of *Nations* and the *Civil Law*. For so atrocious is the Nature, so great the Barbarity, and so unpardonable is the Treachery of the Crime of *Treason*, that the King derives his Right at a greater Distance than the later *Fewdal Law*, and the more ignoble Title of *Few-*

Fewdal Superiority and Dominion. For there was between the King and his Subjects that intimate Relation and particular Tye, to which the Obligation betwixt the *Superiour* and the *Vassal* is only adjected by a new Sort of Contingency and Accession: The one comprehends all within its Bosom, the other contains but a very few. And it would certainly be unjust that the King should be bound to furnish the Expences of the War, and to undertake our Protection, and yet the *Fews* of Rebels should not return unto him, since these belong to him instead of the Plunder, and are the Reward of the Conqueror. Nor is there any Nation in the World so ungrateful to their Princes, as not to allow them this Advantage, and not to look upon it as a Recompence justly due to them, in Consideration of the Pains and Anxiety they suffer

upon the publick Account. Besides that it is a Piece of Honesty and Fidelity which is due to the immediate *Superiour*, and not only is it a certain inferior Kind of Tye, and, as it were, a more imperfect Resemblance of the Alledgiance which Subjects owe to their Sovereign, but also Fidelity is implied in every Obligation of this Nature, and the one follows the other in all the Oaths, which the *Fewdal Law* ordains the *Vassals* to take to their *immediate Superiors*.

Seventhly, My Lord, If the *Few* were confiscated to the *immediate Superiours*, they would be invited to lead false *Probations*, and to lay Snares for their *Vassals*, which we have less Reason to presume or fear from the King, whose Riches exclude all Suspicion of Covetousness, and whose Grandeur and Majesty do entirely banish all Apprehensions of Cruelty. To this may be added

added that when these *Fews* are by this Confiscation brought into the Exchequer, the publick Revenues are mightily increas'd, and that Money is employed to the Advantage of every particular Person, which was collected from the Forfeiture of private Men. Upon which Account, as the publick Utility should be more regarded than any private Consideration, so in this Case the Princes Interest ought justly to be prefer'd to that of the *immediate Superiour*.

Eightly, By the 37th Act. Parl. 2. Ja. VI. it is expressly provided that the *Subvassals*, who at that Time fought in the King's Service, shall not be depriv'd of their *Underfews*, upon Account of the Crimes of the *intermediate Vassals*; which had been absurd and superfluous, if by our Law these *Subinfewdations* would not have appertain'd to his Majesty by the Re-

bellion of the *direct Superiour*. But yet lest this Indulgence should be misapplied and prove of pernicious Consequence, we find it particularly ordain'd by the 201. *Act Parl.* 14 of the same King, that this Grant and Concession shall be eras'd from the publick Archives of the Kingdom. If therefore this Indulgence was not granted by our Law, even to those who expos'd their Lives and Fortunes for their Prince, against their *Superiours*, who were guilty of Rebellion, what shall we say, when the Friends of the Rebel, say, when his Wife is still conscious of the Crime and continuing in the Guilt? And that we may not found all our Arguments upon bare Conjectures, we shall adduce a plain Decision in Behalf of his Majesty, in the Month of May 1610. in a Process rais'd at the King's Instance against the Earl of *Bothwel*.

My Lord, It seems almost superfluous to return a particular Answer to the Arguments that are adduc'd for *Subvassals* after what we have already advanc'd. For from these it appears that the *Subtlety* whereby they contend that the *Few* returns by the Right of the Crown, and not by a *Fewdal* Title is new and unusual in our Law, and neither valid in its own Nature, nor directly contrary to our Assertion, since we have clearly prov'd that the *Superiour* and the *Vassal* are not only join'd together by the *Fewdal* Law, but the *Vassal* is also bound to the first *Superiour* by a nobler Tye and Obligation. So that when it is written in the *Fewdal* Law, that the *Vassal* of my *Vassal* is not my *Vassal*, and that the remote *Superiour* cannot exercise the *Fewdal* Rights against the *Subvassals*; this must only be understood concerning *intermediate Superiours*, who are also

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also Subjects themselves ; but not at
all of the King who is the first Au-
thor of the *Few*; to whom all Persons
owe Fidelity, and to whom the *Few*
returns, free from all the Debts of the
Rebels, lest otherwise those who are
Accomplices and conscious of the
Crime should be Gainers by it, and
therefore this Confiscation and Ad-
vantage is granted to comfort his Ma-
jesty for the Crime committed against
him, and that his own Subjects might
depend upon him, and not, by a di-
vided Fidelity, be distracted between
their Prince and *immediate Superiour* ;
and lest they should forget their Alled-
giance, and upon any Prospect of Ad-
vantage fight for their direct *Superiour*,
against their King and their Country.

My Lord, Besides these Branches of
the *Fewdal Law* and those Answers of
the *Doctors* of it, which make these
Subinfeudations devolve upon the *im-*
medi-

mediate Superiours, and not on the first and remoter ones ought to be so interpreted that they may only obtain in these Crimes which are not directly committed against the Prince or the Common-Wealth ; as appears from these Words of *Craig*. (a) ‘ But the
 ‘ *Few*, says he, when lost for Delinquency accresces to the *Superior*, unless the King pursues the Revenge of an Injury done to himself ; for
 ‘ then that *Few* also which he holds of another *Superiour*, if he is condemn’d, devolves to the Exchequer. Now that this is plainly the Sense of these Places, we are assur’d by *Speculator*, *Oldradus*, and *Guido Pap.* in those Passages I have already adduc’d : For as it was reasonable to give the *Under-Few* to the *immediate Superiour*, when the Crime was committed against him ; so upon the same Account
 it

(a) Pag. 373.

it was thought just that this *Under-Few* should, by the same Right, devolve to the King, when the *Subvassal* was condemn'd for *Perduellion* and *Treason*, since these Crimes can only be committed against his Majesty. And then in that Case also wherein the *Under-Few* devolves upon the immediate *Superiour*, he was bound to produce the *Subvassal* to the immediate *Superiour*; that so he might make some Reparation for the Injury he had committed; which, if the immediate *Superiour* was either unwilling or incapable of performing, then the *Under-Few* return'd to the greater *Superiour*, or the *Superiour* of that *Superiour*. The Text occurs in §. *Illud quoque præcipimus de prohibet. feud. alien. per Frederic.* ' We also ordain, that if
 ' the *Vassal* has another *Vassal* to his
 ' *Few*, and the *Vassal's Vassal* has of-
 ' fended the *Superiour* of the *Superiour*,
 ' unless

unless he has done it as a Piece of Service to the other *Superior*, whom he had before, without any Fraud, let him be depriv'd of his *Few*, and let it return to his *Superiour*, from whom he held it himself, unless upon his Demand he is ready to satisfy the greater *Superior* whom he offended; and except the *Vassal* and the same *Superior*, being requir'd by his *Superior*, crave from him who has offended the lesser *Superior* to make Satisfaction, let him lose his *Few*.

Nor am I mov'd, *My Lord*, by the Arguments which are adduc'd for this Statute: For since this Law was enacted, in Behalf of the King, and contains *Extensions*, that are odious in their own Nature, if the Detestation of Rebellion had not dictated them, I am surpriz'd to find it so vastly misapplied. For who can be so far mistaken, as to imagine that all the *Fews*,

without any Distinction of a *Vassal* from a *Subvassal*, which the condemn'd Person had possess'd for the Space of five Years, should *devolve* to the King; not only *exempted* from all Burdens, but without any Regard to the Rights of all others, and even of the true *Superior*; and yet that the *Underfew* cannot return any other Way than *burden'd* with the Debts of the *Vassal*. Since then it is enacted by the Statute, that when the *Subvassal* is condemn'd, the King ought to *present* a *Vassal* to the *Superior*, who may succeed to every Thing which belong'd to the *Subvassal*; the Reason is, because his Majesty cannot discharge the Office of the *Subvassal*, and therefore is oblig'd to *present* or *name* another who may supply the *Subvassal's* Place, and succeed to all the Rights which the King has acquir'd. And the Word (*Belong*) ought here, as every where else, to be so in-

interpreted that the Sense may be, whatever was the *Vassal's*, to which the Exchequer could succeed, intirely belongs to the Person presented. And then, as to the other Branch of the Statute, which provides for the *Subvassals*, that they may not sustain any Loſs by the removing of the Discharges of their *Superior*, it was only introduc'd from the Consideration of Justice and Equity; lest they should suffer any Inconveniency by the Deed of another Person. And this was even necessary to them, when the King or the first *Superior* had approv'd the *Subinfeudation*: For this Approbation could not possibly secure those remote *Superiors* from all Action, for not payment of *Few-duty*, and other *rescissory Actions*, which are founded on *irritant Clauses*. Upon which Account, it was thought very reasonable, by this Statute, expreſſy to secure the *Subvassals*

sals whom it would also have protected in all other Points, if the *Legislators* had been pleased so to do. Nor was this omitted through Carelessness, but upon Design, that the *Subvassal's* being uncertain about their Rights, might assist their Prince against the *immediate Superiors* who endeavour'd to disturb the State, and might deserve and incite his Majesty's Bounty by their hearty Valour, obliging him by Gratitude, when they could not do it by Law; and that they might obtain Confirmation from the King; and so all his Subjects might own him to be their *Superior* in every Case. And this *Confirmation* ought not at all to be look'd upon as a Burden, since the Expences which are requisite to it are very inconsiderable, and *Confirmation* is necessary to other Things, namely, that *Nonentrys*, *Escheats*, and other Advantages and the

Casualties, which redound to the Exchequer from the Crimes of the *intermediate Superior*, may be intirely excluded.

If therefore, *My Lord*, the Laws formerly granted this Preference to Kings, that were protected by the Honesty and Virtue of the Age wherein they liv'd, when Religion, encouraging Gratitude, condemn'd Treason as the basest of Crimes; why ought not this much rather to be indulg'd at this Time, when Rebellion is transform'd into an Appearance of Sanctity, and has impudently rais'd it self to a specious Resemblance of Magnanimity and Valours?

THE
Fifth Pleading,

From the

CANON LAW.

*For the Magistrates of the Town of
Haddington, against the Earl of Had-
dington.*

*Whether when the Parish modifies a Sti-
pend to a Subsidiary Minister, the Right
of Presentation accresces to the Patron
of the Rector, or belongs to the Pa-
rish, in Consideration of the Stipend ?*

My Lord Chancellor,

THE Church of this Town is one
of the richest Rectorys of this
King-

Kingdom, whose *Patron* was the King, who succeeded in Place of the Pope, and granted the Right of *Patronage* to the *Earl of Haddington*. But the *Reclor*, not being able to take care of so many Souls, this Church was liberally Doted by the Magistrates with a *Subsidiary* Stipend for the Benefit of the second Minister ; by which Dotation they justly imagin'd themselves to be the *Patrons* of this second Minister. But when they had presented him according to the usual Custom, the *Earl of Haddington* contends that he is the only *Patron* ; for 1st. Since he is the *Patron* of the Church it self, he affirms that he is also the *Patron* of this Subsidiary or assisting Minister, because the Accessory follows the Nature of its Principal.

Secondly, In a Church, which has a *Patron*, no Man can do any Thing without the *Patron's* Consent ; and as he,

he who builds any Thing to a Church, does not acquire any Right by that Building, but loses that which was formerly his own; so much less can he who has only furnish'd a Stipend to a Minister in that Church, acquire the Right of *Patronage* by this *Dotation*.

Thirdly, If the contrary obtain'd, any Body might intrude himself into a Share of the *Patronage* without the Consent of the *Patron*.

Fourthly, He contends that it is unjust, the building of the Church, which the *Canons* suppose to be erected by the *Patron*, should be afforded to other Ministers who were not *presented* by him.

Fifthly, The *Earl's Advocates* affirm, that this was expressly decided in his *Favour*; (a) where *Alexander the III.* being consulted by the *Arch-Bishop of Canterbury*, who ought to be *Patron*

(a) Cap. 3. de Eccles. ædif.

Patron of a Chappel that was erected within the Bounds of the Parish Church; Answers, That the *Rector* or the Parish of the principal Church is the true *Patron* of that Chappel. And the Commentary of *Ostia*, in Pursuance of this Decision says, that this is appointed by a certain Right of Compensation, because the Chappel was founded in Prejudice of the greater Church, since that is only a Member and *Accessory* of the Parish-Church, as *Innocent* tells us (a). So that the Person, who is instituted in it is only the perpetual *Vicar* of the *Rector* of the greater Church; as we find it decided in *Guid. Pap.* (b). Since therefore the principal *Patron* and the *Rector* of the *Metropolitan* Church is also *Patron* of the other Church that is different from it, and which another built and doted much more will he re-

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(a) Lib. 2. Reg. Epist. 137. (b) Decis 36.

main the *Patron* of his own Church that was built by himself.

But, *My Lord*, Notwithstanding these Arguments, I contend that the *Magistrates* of this City who alone *modified* the Minister's *Stipend* are *Patrons* of this Benefice ; and that the *Presentation* of him appertains to them only, as I shall endeavour to make appear by these Considerations.

First, My Lord, The Right of *Patronage* it self was first introduc'd, either that by this Consideration, rich Men might be induc'd to found Churches at their own Expences, which so much obtain'd, that whole Kingdoms, being exhausted and impoverish'd by this Madness and *Entbusiasm*, the Emperours were oblig'd to appoint some Measure and Proportion for regulating the Building of Churches, (a) or rather from a devote and religious Grati-

(a) L. 16 Co. Theo. depen,

Gratitude of the primitive Church (whose Priests, were at that Time, neither ambitious of secular Advantages nor apt to envy and molest the Laity) which confer'd this Right of *Patronage*, as a lasting Monument of their Liberality and Bounty. And as we are told in *Can. 37. Concil. Tolet.* The Priests, who otherwise want the Comforts of Life, ought to make this Return of Gratitude to those by whom they are supplied.

But whether it proceeds from the one or the other of these Causes, we must needs in every Case conclude, that those Magistrates, who alone maintain this Minister ought to be gratified by this remuneratory Bounty, and others by their Example invited to the like Liberality. And what Kind of Gratitude demands a Return to be made in his Favour, who contributed Nothing himself? This would be by

a *Pious* Ingratitude to transfer my Merits to another Person, and to destroy the true *Patron* by Hunger, while in the mean Time another was maintain'd with his Food. And if these Things were thought necessary to the Church in its warm and vigorous Youth, I leave it to your *Lordships* to determine what ought to be said in this cold and frozen Old Age of it, when the low Condition, both of our Church and Devotion is too well known.

Secondly, My Lord, I affirm that not only he who has built a Church, but also he who has *doted* it, does acquire the Right of the *Patronage* of it. For, as *Justinian* says(a), 'If any Man, building a Church, or furnishing an Aliment to those who serve the Cure, brings the Ministers to the Bishop.

(a) Nov. 51. c. ult.

‘ Bishop. From whence *Innocent IV.* (a) affirms that he has the Right of *Patronage* with the Builder himself, or even against his Will, as if they had both at the same Time founded that Church. Since therefore they have furnish’d the Salary and this *Canonical Fund*, the Right of *Patronage* must needs be acquir’d unto them ; nor does the former *Patronage* exclude this Right, which proceeds from a new Liberality : Nor does it lessen the Force of this Argument that these *Magistrates* have not expressly reserv’d the Right of *Patronage* in the *Dotation* it self ; since every Body knows that the Right of *Patronage* is by *Dotation* legally acquir’d without any Reservation. (b) And the Foundation of it being prov’d, it is not necessary to prove the Reservation

(a) Ad Rub. tit. de jure Patronatus. (b) Lambert de jur. part. articl. 5. 10. quæst. 2. part.

vation of the Right of *Patronage*. (a) For that these Reservations are necessary, some new *Doctors* have only affirm'd, being induc'd to do so from too servile an Adulation of the *Papal* Power, and neglecting the *Bait*, when once they have catch'd the *Fishes*. But since this is owing to the *Patrons* from a Principle of Gratitude by that *Law of Nature*, in which all Remunerations are founded ; and since it is granted by *Statutes* and *Canons*, we may very justly affirm that it is due *ipso Jure* ; and what is mine by *Law* needs not be reserv'd ; nor do these Things descend to Heirs which are owing from meer Liberality, and not by *Law*. But this *Right* is transfer'd to Heirs, not only by the *Canon Law* (b), but also by ours (c) : From whence *Molinaus* does excellently observe : But
 ' so

(a) Masc. car. conclus. 960. Num. 31. (b) Canon. filiul. 16. Quæst. 7. (c) Reg. Maj. lib. 3. cap. 33. Num. 7.

‘ so great a Mistake is it, that the
‘ *Patron* derives his Right of *Patro-*
‘ *nage* from Reservation (as some new
‘ *Canonists* have fondly imagin’d) that
‘ he possesses it by a primitive Title,
‘ and as a Part of his ancient *Right* and
‘ *Dominion*. Altho’ our Country
man Sir *Thomas Hope*, requires Re-
servation, being too apt in this Point
as well as in several others to follow
the Opinions of the Modern *Canonists*.
But whatever may obtain in this
Point of Law, my *Clients* could not
possibly reserve this Right, because
they always retain’d this *Dotation* in
their own Power, and from that ve-
ry Moment, wherein the Provision was
made, they have always behav’d as
Patrons ; and therefore it was the
Part of the former *Patron*, at the Be-
ginning not to have communicated
the Church, and to have vigorously
oppos’d the *Dotation*, unless they would
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intirely renounce the *Patronage* of their *Stipendiary* Minister : Which if they had done, they would either have obtain'd it by a voluntary Concession, or else not have bestow'd this Salary ; and it is more than probable that the *Patron* of the *Rectory* would not have refus'd it, since, by this *Dotation*, the Charge of his Minister would be extremely lessen'd ; and consequently his Benefice be more desirable, because this would render it less difficult and laborious ; besides, that it is very agreeable to the Character of a *Christian* to provide as much as possible for the sufficient Care of Souls : And (as *Innocent* the IV. in the Place already cited, affirms) it ought to be a very acceptable Piece of Service to the Founder, that our Church is assisted and supply'd by the Bounty of another.

Thirdly,

Thirdly, My Lord, So true is it, that *Posterior Donations* admit us into a Share of the Right of *Patronage*; that from thence proceed these *alternate Presentations*, so often mention'd in the *Canon Law*, by which the *Patrons* are allowed in their several Turns to present the Parish Ministers; and this is call'd a Partnership or Society of *Patronage*, by *Innocent III.* (a) a Custom which arises from the *Civil Law* (b), where the *Servitudes* are permitted to be us'd by the *reciprocal Superiors* in their several Turns. But if the first *Patron* swallow'd up all the *posterior* ones as so many *Accessions*, there would neither be Place for this *Gratification* (since he would be the only *Patron*) nor would there be any of these *intermediate Presentations* going round in such a Circle. Besides, from

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(a) Lib. 3. Reg. Ep. 226. (b) L. quoties 34. de usu fruct.

the same Cause it has proceeded that there are not only *alternate Presentations*, but which more nearly concerns the present Case; one of the *Patrons* has the *Presentation* of the one, and another has that of another; and therefore in *conventual Churches*, and among us, at this Day in our *Collegiate Kirks*, it frequently happens that the *Prelate* and the *Prebends* have different *Patrons*; which does also frequently fall out in *Colledges* and *Universities*, where the *Founder* of them does not always *present* all the *Regents*, to be sure, for this Reason, because he who has founded the Church or University was not also the *Founder* of the *Prebends* or *Regents*.

Fourthly, My Lord, It is a Maxim of Law generally receiv'd among the *Canonists*, that the *Patron* ought to be maintain'd by the *Incomes* of his *Benefice*, if he is reduc'd to *Want*; lest

he be ruin'd by his own Liberality
 (a) But if these *posterious Dotations*
accresc'd to the first *Patron*, the latter
 Benefactors would be depriv'd of this
 Priviledge ; nor in these Benefices
 would there be any Place for this
 Maxim ; since the first could not de-
 mand this Return, because the Bene-
 fit did not proceed from him ; and
 consequently this *Alimentary Hypo-*
thec would be very unjust, with Re-
 spect to him ; nor could the second
 have any Pretences to it, because he
 would not be accounted the *Patron*,
 and therefore if the Assertion of our
 Adversarys is true, it would in Justice
 appertain to none of the two.

For this Priviledge is only due to
 the *Patron* who is the Benefactor ; and
 consequently not to the first, because
 he is not *Patron* ; nor to the second
 since he is not the Benefactor. And

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(a) 6. quicunque 16, Quest. 7.

this Difficulty must needs extremely incommode us, who by an express Statute, namely of *Ja. VI. (a)* have indulg'd this *Priviledge* to *Patrons* that when their Church is vacant without their Fault or Neglect, the Incomes of it appertain unto them. And that this also obtains in *France*, *Molinæus* affirms: Nor can we imagine any Thing which is more just and reasonable, since the *Patrons* are the Distributers of their own Benefits and intrusted with the Custody of their own Churches, when they are vacant. *(b)* But if he who granted the *Donation* is not the *Patron*, he has no Right to this *Priviledge*; nor should it be indulg'd to him who did not enrich the Church, since here is wanting the Reason of Gratitude, from whence this *Priviledge* at first proceeded: If therefore the publick
Stock

(a) Act. 1. Parl. 21. (b) Cap. in quibusdam 12
Ext. de Pænit, Cap. generali 13. de Elect. in 6.

Stock of this City were exhausted by Debts, would it not be the most unjust and unaccountable Thing in the World that the publick Goods should be expos'd to Sale, and the *Magistrates* themselves imprison'd, while in the mean Time the Salary, which they granted remain'd in the Hands of the *Patron* of the *Rectory* who gave nothing at all? Would it not be infinitely juster, and more agreeable to the Principles of *Christian* and *Spiritual* Gratitude, that in this Case the Stipend should not be any longer due; and ought it not to be recover'd from them, by the *Condictio, Causa data, Causa non sequuta*. For since this Provision was made for the Benefit of the Town, and that it might be a Monument of their Piety, if these happen'd to fail, who would chuse to determine that this extraordinary Piece of Generosity should be entirely buried

ried in so black an Ingratitude? Nor can any *Decision* possibly extend to more Persons and to a greater Number of Cases than this plainly does; since there is hardly any City among us, which would not be injur'd by this Determination: For it is now very usual for them to vye with each other in maintaining these *Stipendiary* Ministers. And to this, the Citizens very willingly agree, because they know that theirs shall be prefer'd to all others; and those whom they have advanc'd to this Dignity, will, by their pious and prudent Conduct and Advice, be very necessary for managing Affairs, and settling Commotions and Disorders. Of all which Advantages, they would be entirely depriv'd, if this Promotion were in the Power of a Stranger; for those Persons, who were advanc'd by him, would frequently raise and foment Factions
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and Seditions among themselves, in Behalf of their *Patron* against those very Citizens who founded the Church. Nor ought any *Patrons* to be so much favour'd as those who are themselves both *Patrons* and Parishioners. Since they are always most edified by the Sermons and Labours of those Ministers whom they have advanc'd to the Cure. By which *Presumption*, the Convention of the *Estates* of this Kingdom was lately so much convinc'd, that, notwithstanding the Right of *Foundation*, they granted the Election of the Parish Minister to the Parishioners themselves. And altho this Statute has now gone into Desuetude, yet the *Presumption*, on which it was founded, does still remain, and we are frequently allow'd to argue from abrogated Laws.

My Lord, To the Arguments of our Adversarys, I answer, that this second Mini-

Minister does not *acresce* to the principal Benefice of the *Rectory*, but is erected into a distinct Dignity by itself ; and that this *Conjunction* seems rather to be a Sort of *Commixtion* than *Accession*, in which Kind of acquiring Dominion, this Rule obtains, that if the Things mix'd together can possibly be separated, the Properties do also remain distinct. In spiritual Matters, we follow Truth rather than Fiction (a) and therefore we ought more to regard the Liberality of the Founder, than the Fiction of this imaginary *Accession* ; and since this Church is daily repair'd by these *Magistrates*, and not by the *Patron*, we ought to believe that the Property of the Building appertains to those who are under a Necessity of taking Care of it ; and this Priviledge, in Relation to the Minister, is but too small a Return for their Beneficence.

(a) Arch. Cap. un. de vot. in 6.

neficence. And altho' at the Beginning the *Patron* was not oblig'd to communicate his Church and furnish them the Use of it ; yet we ought not from thence to conclude, that this Liberty being granted unto them, these *secondary Benefactors* renounc'd the Right of *Patronage*, and at most we can only infer from it that the *Patron* of the *Rectoral* Church can yet stop the Entry of a second Minister, but has not the Power of *presenting* him. Besides, methinks, he has acquir'd a Right of preaching in it by a *legal Prescription*, which may obtain in Behalf of one Clergy-man against another, altho' when the Matter concerns Laicks, it is usually call'd in Question ; for *one priviledg'd Person is not allow'd to make use of his Priviledge against another*; or at least the Presence and Permission of the *Patron* ought to be look'd upon as his Consent (and certainly if he had ex-

preſſy granted them the Uſe of his Church, there would be no Difficulty in the Caſe) where the Benefit and Advantage of the Church is ſo nearly concern'd; for not only as often as it tends to a Man's Utility, is Silence eſteem'd Conſent, but alſo when it may poſſibly prove to his Diſadvantage, provided the Subject be favourable to the Common-Wealth. Nor needs this occaſion any Umbrage or Apprehenſion to the lawful Patron, that his Right can be divided by the violent Intruſion of another Perſon; for it cannot be taken from him without his expreſs or tacite Conſent, unleſs it has Relation to ſomething which is unqueſtionably the Advantage of the Church.

My Lord, As to Cap. 3. de Ecleſ. adif.
I anſwer, that the Right of the Patronage of that auxiliary Chappel was adjudged to the Patron of the Metropolitan Church

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Church (as the Commentary informs us) by a Right of Compensation, because it was founded in Prejudice of the greater Church. But no Inconveniency has befallen the Rector by our Provision; nor was the Provision furnish'd from his Incomes: For the Matter of Fact was this; a certain Village was so far distant from their Parish Kirk, that in the Time of Winter the swelling of the Waters did frequently hinder the Parishioners from going to their own Church. Upon this they complain'd to the Bishop of the Diocese, and petition'd him that they might be allow'd to build a Chappel or *inferiour* Sort of Church in their own Village. At their Request, *Alexander* the III. order'd a Church to be erected in that Village, because the Principal one was sufficiently provided by other Funds, with plentiful Revenues, and return'd them this Answer,

That the Parish Minister of the principal Church is the true Patron of that Secondary one, because he was maintain'd by the Incomes of it. From whence we may safely argue, First, That the Patron of the principal Church is not the Patron of the auxiliary Chappel, as our Adversarys should have demonstrated him to be. Secondly, since it is here expressly determin'd, that the Parish Minister of the principal Church is the Patron of the auxiliary Chappel, because that Secondary one was maintain'd by the Revenues of it; it necessarily follows, that the Right of Patronage must be infer'd from the Dotation, and does not follow the principal Patronage as an Accession of it. And altho' the Consent of the principal Rector is requir'd to the building of a new Church within his Bounds; yet in this Case, we find the Consent

of the Patron is not at all demanded. For, tho' this Benefice, whereof he is the Patron, cannot be join'd to another Cure without his Consent; yet it does not from thence follow that another Minister cannot be added; since in the one Case his Right of Patronage is lessen'd, but in the other, he has the sole Presentation of his own Parson. And yet even in the former Case, notwithstanding all the Reluctancy and Opposition of the Patron, the Bishop, upon a just Account, can without the Consent of the Rector build a new Church within the Bounds of the old one, (a) because (as Bengius remarks (b)) the private and particular Advantage of the Rector ought to give Place to the publick Utility of the Church; and therefore we read in *Panorm. Concil.* 105. that the Right of a new Church within his Bounds

(a) Cap. ad audientiam in fine de ædifican. & reparan. Eccles. (b) de benefic. cur. haben.

of the *Patronage* of the *Altar*, even in a Church, which depended upon a *Patron*, was adjudg'd without any Manner of Reservation. Upon which Consideration it has obtain'd among us, that Churches are frequently united, which have different *Patrons*, even against their Wills; the *Presentation* being only reserv'd to them in their several Turns; and why should not this be much more granted for the good of the Church? And why should not the Magistrates of this City, who so carefully provided for the Salvation of their Souls, have the *Presentation* of this Minister, to whom they furnish'd a Stipend, which is the most honourable Thing in the World that a *Patron* can possibly be depriv'd of? Especially considering that the *Patron* of the *Rector* does still continue to present one as he did before: Nor is any Thing deduct'd for his Benefit from

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the Revenues of the principal Rectory. And this is not only more agreeable to the Canon Law, but was also acknowledged to be true by the Pursuer's Grand-father, who by a Bill humbly petition'd the Magistrates of this City that they would present his Chaplain to this Benefice. By which Supplication he plainly homologated our Right; and what was formerly approved by the defunct cannot now be gainsaid or controll'd by his Heir. Nor can it be objected to us with any Grace, that the Writ it self has perish'd, during the Space of so long and troublesome a Time; and that now it cannot be prov'd but by the publick Records; for who can be imagin'd to have had the Impudence to inroll such a Piece of Falshood in the Register to the Prejudice of the present Secretary of this Kingdom, who is yet alive, and lives at so small a Distance from

~~from the Place where it was done?~~
If therefore, *My Lord Chancellour*, this honourable Bench will regard the constant Strain and Tenor of the *Canons*; if they will have any Respect to the pious Gratitude of the Church or to that which may tend to excite others to the like Generosity; in short, if they will consider the Customs of this Place, and the publick Utility and Advantage of our national Church, I make no Manner of Doubt but they will determine this Affair in Favour of my *Clients*; lest for the future Laicks may look upon all *that* to be entirely lost, which, out of their Charity, they have given for sacred Uses. We cannot possibly imagine a more plentiful *Usury* and Return of our Piety, nor any nobler, or more beautiful and lasting Monument of Fame and Reputation.

**THE
Sixth Pleading,**

From the

MUNICIPAL LAW

For David Melvil, the Son of the Lord Melvil.

Against the Earl of Rothes, the Lord High Chancellor of Scotland.

Whether in a Substitution of many Degrees, the remoter Heir, only existing at the Time the Heritage falls, may serve himself, or the possible Heir ought to be expected, because he is nearer?

My Lord President,

Alexander, the first Earl of Leven, having acquir'd a plentiful E-
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Estate by his Bravery and Valour, endeavour'd as much as possible to retain it among his own Offspring, and therefore prefer'd all the remotest Agnates of the Family of *Rothes*; but his Grand-child, who died last infested in these Lands, left them to the Heirs of his own Body, who failing to the second Son of the *Earl of Rothes*, our Chancellor, who was his Uncle; & he failing to the second Son of the *Lord Melvil*, who married his Sister; and he failing to the second Son of the *Earl of Weems*, and lastly, in Default of all these, to his Heirs and Assignees whatsoever.

From the Time of the Death of *Alexander Earl of Leven*, there was none existing, nor is there yet alive any Son of the *Lord Chancellor*; And therefore the second Son of the *Lord Melvil*, by Virtue of a private Destination demands the Estate of his Uncle, since he is the only Person alive at the present Time

From the Municipal Law.

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Time the *Heritage* falls, who is in Condition to enter Heir. This Claim is vigorously oppos'd by the Lord Chancellor who contends that the Estate is due to his second Son when ever he shall exist, and that it is not lawful for the second Son of the Lord Melvil, to serve himself Heir as long as there remains any Hope or Prospect of the first. So that from the Form all this Substitution this Question arises, Whether any Person can enter Heir, before it appears, whether the Chancellor shall die without a second Son?

But, My Lord, I contend that he only is Heir, who of all the *Substitutes* exists at the Time the *Heritage* falls; and that we ought not to wait for this possible and imaginary Heir, or rather the *Shadow* of one. And this Assertion I shall endeavour to confirm by these Arguments.

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First

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First, My Lord, This Clause and Destination (who failing) as all other Expressions of this Nature, ought to be so interpreted; that it may be accommodated to the Utility of the Writer: For it is to be presum'd that every good Father of a Family would in such a Manner have dispos'd of his Estate; for no Man is presum'd prodigally to throw away his Goods. And that which was design'd for our Benefit, ought not to be turn'd to our Disadvantage.

But if the Author of the *Tail* had resolv'd by this Clause to make the Enjoyment of his Estate depend on the Expectation of a possible *Issue*, and to delay it till such Time as he should actually exist, he would entirely have ruin'd his Family. For who is ignorant that this Possibility may be prolong'd for the Space of 50 Years? The Age and Constitution of the

From the Municipal Law. 253

the Lord Chancellor give us all the Reason in the World to hope that it shall be so. Now if the Entry of the Heir were delay'd for so long a Series of Years, while the Estate continu'd in this Condition, the Few would return to the King, as lawful Superior. And during the Time that the Few remain'd in his Majesty's Hands, the Annual rents would increase to the triple of the principal Sum; for the Rents out of which they ought to be payed will fall to the King and his Donatar. And since even the most fertile Ground does only equal the Value of the Incomes which arise from it in the Space of twenty Years, we may easily by a very just Consequence infer, that by this Substitution, this Family would be irrecoverably sunk in Debt, before the future Heir could enter upon the Possession of his Estate; as if this Substitution had been made

made rather in Favour of the Exchequer than of the lawful Heirs. Besides, while this Expectation lasts, there will be no Person who shall make it his Business to provide for the Burdens & Necessity of this honourable Family; no Body will have the Inspection of the Tutors Accompts; none shall defend it from the fatal Periods of Prescriptions, and the malicious Designs and Contrivances of its Adversarys: And in short, there will be none who shall have any Title to transact with the Creditors, or demand any Thing from the Debtors.

Secondly, My Lord, That meaning ought certainly to be put upon every Writing, which the Person himself would in all Probability have express'd, if the Difficulty had been represented to him. For what reasonable Man will make any Manner of Scruple to affirm that the Testator was unwilling to

to expose his Estate to these Troubles and Inconveniencies? And if any Body, while the *Substitution* was read over to him, had ask'd him this Question, Does your Lordship intend, by these Words, (*who failing*) to suffer your Estate to remain without an Heir, till such Time as it appears, whether the Lord Chancellor shall have a Son or not? Whether are you willing that in the mean Time the Few shall return to the King; or that the Heir, who is next in the *Substitution*, shall enter upon the Possession of your Estate, that to the Advantage may redound to your own Family and your own Creditors? Can we imagine his Lordship would have return'd any other Answer, than this, that he was willing all the *Substitutes* should succeed in such a Manner as to make no Vacancy or Interruption, and that he should be prefer'd, whom God Almighty (who

(who alone has the Power of making Heirs,) seems to have chosen for that End ; and who having the good Fortune to exist at the Time the *Heritage* fell, did intirely exclude all Uncertainty, together with these possible and imaginary Heirs ? And this Interpretation is excellently adapted to all humane *Deeds*, & particularly to *Substitutions*. For the great Design of these is to preserve Families ; *Substitutes* being chosen rather to represent the Family of the deceas'd Person, than to be enrich'd by it themselves. Now that the *Defunct* propos'd to himself this End in his *Substitution* will appear, if we consider, that in the Disposition of his Estate, he made it an express Condition, that the *Substitutes*, altho they were *infested* in it, should be bound to restore this *Fiduciary Heritage*, or (as our Lawyers speak) to *denude* themselves in Favour of the remoter

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Substitutes, if the Estate of some richer and more ancient Family were left unto them.

Thirdly, My Lord, If this Expectation of a future Heir were render'd absolutely necessary, a great many ridiculous Absurdities would be consequent upon it. Let us then suppose that the youngest of three Brethren left a plentiful Fortune to the second Son, yet unborn, of his Elder Brother; and in Default of him to the second Son of the second Brother and burden'd them with the Payment of the Portion, of his Daughter *Seia*: Would it not be the most unreasonable thing in the World that the Daughter of the *Testator* should be unfurnish'd of a Portion till such Time as the second Son of the elder Brother were born. For the *Donatar* being neither oblig'd to afford Alimment nor Portion, the young Lady, by

the Want of a suitable Provision, would not only be depriv'd of all Hopes of Marriage, but be also in Danger of losing her Life. And how much would those Persons be disappointed who should leave in Legacy the Annual-Rent of a Sum to their aged Uncle or Step-Mother, if the Heir express'd in the *Tailzie* by such an Expectation were eternally uncertain.

Fourthly, My Lord, This would not only tend to the Destruction of the *Defunct*, and his Heirs, but also of his lawful Creditors. For while the Condition was delay'd, some Creditors would be unjustly depriv'd of their principal Sums, without which they cannot possibly maintain their Trade; and others would want their Annual-Rents, whereby they must needs support themselves, and their Families: Parents would not be able to educate their Children, nor Children in a Condition to maintain their Parents: The
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Republick would languish without Trade and Commerce, and private Fortunes without sufficient Funds for their necessary Expences. And which, is the Source and Fountain of all Manner of Injustice, this *Decision* would unluckily furnish an Occasion of defrauding Creditors and ruining them entirely, for as soon as the Debtor perceives, he is become Bankrupt he may so order Matters that, by this Delay, the *Few* shall unavoidably fall to the King; and yet at the same take Care that the Advantages of the *Few* be transfer'd to his *Fiduciary* Heir. And altho, when Confirmation is obtain'd from the *Superior*, the Creditor may defend himself against *Wards* and *Escheats*, and even Treason itself; yet in this Case Nothing remains that can possibly afford him any Manner of Assistance. Which Considerations and others of the like Nature do suf-

efficiently demonstrate the Injustice and Severity of this Sentence.

Fifthly, My Lord, Not only a great many Inconveniencies and Absurdities, but an infinite Number of inextricable Difficulties would be occasion'd by this Delay. As for Instance, if the Son of a Sister or any other Woman had been substituted, as in this Case was the Son of the Countess of *Weems*, then since the Time wherein Women are accounted fit for bearing Children is very uncertain, it could not possibly be determin'd when the Substitute of the remoter Degree ought to enter Heir; nor can Heirs be properly said to fail, as long as Nature is not acknowledg'd so to do. And altho Nature does not usually permit Women to bear Children after their fiftieth Year, yet lest she should seem to be confin'd by too narrow Bounds, she indulges some this Priviledge even beyond

yond their sixtieth Year, and is unwilling that Rules and Restrictions should be impos'd upon her by those who ought rather to obey the Laws she enacts.

Sixthly, My Lord, This Expectation of a future Heir would oppose the Rules of that Succession which descends from the *Civil Law*. It would be contrary to the *Fewdal* Succession to the *provisional* and *qualified* Succession which we call a *Talzierd* one, to the Nature of the *Fem*, and to the common *Stiles* and *Forms*, by which Heirs among us are call'd to the Succession; nor does the Nature of Dominion admit of this Suspension and Delay. As to the Succession, which descends from the *Civil Law*, where it follows the Call of Nature and is not distracted by any Conditions, the Father succeeds to his only Son, altho there is still a Possibility of his begetting more

more Children. But if it were true that future and Imaginary Heirs could exclude those who are already born, then they would exclude their Father; since Brothers are always prefer'd to the Father. And just so, if only a Sister is alive, she succeeds to the whole Estate of her Brother, altho the Father may beget another Brother to the deceas'd Person, who, if he existed, would infallibly exclude the Sister. To this may be added, that even in *Moveables* these *allodial Goods* are divided between three Brothers, whom we suppose to be alive, altho their Father not being yet dead, other Brethren may be expected.

From all which Examples it appears, that Children already born, ought, by the common Rules of Succession, always to be prefer'd, and not those who only exist in Hope and Imagination. And from thence also we may
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very justly argue, that this Order should be admitted among *Substitutes*, if nothing appears in the *Tailzie* or *Disposition*, which, by an oblique and irregular Clause, may oblige the Judge to neglect it; but in this Case no such Thing can be alledg'd, and therefore the afore said *Series* ought certainly to obtain.

Seventhly, My Lord, In a Tailzied Succession, wherein the Substitutes are admitted, according to the Order in which they are appointed, it is the justest Thing in the World to bestow the Estate upon those who are alive, and not to wait for Children who are yet to be born. For Substitution was introduc'd in Law, upon this Account, that the Defunct might have one to represent his Person, and manage his Estate: But a Man cannot be represented by one who does not exist; For that which is not in Being does

does not submit of *Qualities*. And from the Nature of the *Substitution*, that Interpretation ought to be put upon this Clause, which least incommodes the *Testator*, and is least contrary to the *Few* itself: Nor ought we to wait for a future Heir, when the Expectation of him would leave the *Testator* without a *Substitute*, and the *Few* without a *Superior*. And since the main Scope and Design of *Substitutions*, is that one of the *Substitutes* may always serve himself Heir; it were certainly the absurdest Thing imaginable to put that Interpretation upon a *Substitution*, which would necessarily occasion the Want of an Heir. And therefore, among us, the living Heir of the *Tailzie* is always prefer'd to him, who is yet to be born; as we find it happen'd in the *Earl of Roxburgh's* Case, who succeeded as Heir of *Tailzie* to his Son; altho' his Children that

perished *before* *he* *was* *born* *were*

were yet to be born, (if there were any Place for such imaginary Heirs) would have intirely excluded him. In which Point, our Customs exactly imitate the *Civil Law*: For, as the Learned *Vinnius* does excellently observe, 'That an *Institution* may be valid and effectual, it is necessary, the instituted Heir be capable at the Time of the Death of the *Testator*; nor do the Principles of Law permit it to be otherwise. And if he is incapable at the Time of the *Testator's* Death, it is to no Purpose to enquire into his *Capacity* at the Time of his *Entry*. For he who is not capable at the Time of the Death of the *Testator*, altho' afterwards he is capable, cannot possibly acquire a just Title to the Estate (a). At which Testimony those Persons ought to be silent, who fondly expect future

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(a) *L. si alienum, ff. 1. de Hæred. Institut.*

and imaginary Heirs, in direct Opposition to the Principles of Law.

Eighthly, My Lord, The *Briefes*, by which the King appoints lawful Heirs to be acknowledged or *serv'd* (as we speak) command the sworn Men of *Inquest*, to enquire who is the nearest lawful Heir to the deceased Person, but never who may possibly be Heir, nor does our *Sute* admit any *Forms*, whereby Creditors, during such an Expectation, may recover their Debts, altho' sufficient Remedies have been provided against existing and apparent Heirs: Nor have any of our Lawyers ever invented a Clause, whereby they might prevent this falling of the *Few* into the King's Hands, upon Account of *Nonentry*; against which they would infallibly have provided, if they imagined, that by this Form (*who falling*) the *Few* would return to his Majesty by *Nonentry*, while the possible and future

future Heir is expected. And on the other Hand, the King's *Advocate* and *Solicitors* would never have omitted to bring into the Exchequer the Advantages which arose from this falling of the *Few*; if by this Interpretation *Nonentry* were due, during such a Delay. But altho' Opportunities of this Nature have been often presented, yet this Advantage was never claim'd by the Exchequer.

Ninthly, My Lord, This Delay of the Entry is also contrary to the Nature of the Few: For a Few is a mutual Contract, in which the Superior and his Vassal are so reciprocally oblig'd to each other, that the one cannot hurt the other without his Consent; and the Nature of the Few cannot be chang'd by any private Faction. But if this Clause were to explain'd, that the living Heir could not enter, as long as there remain'd any Possibility of a future

future one, then the Superior would
 not have a *Vassal* to perform the usual
 Services due to him for his *Few*; in
 Consideration whereof *Fews* were o-
 riginally granted; nor could the *Few*
 be affected by Forfeiture or Escheat.
 For there would not be any *Vassal* by
 whose Crimes the *Few* might fall;
 and instead of that nobler and more
 profitable Casualty, by which the in-
 ferior Sort of Dominion is consolidated
 with the direct, nothing but the bare
 Entry, would accresce to the Superior;
 from which, before Declaration, those i-
 maginary Incomes, which we usually
 call *retour'd Dutys* would be only due;
 and even of these the direct Superior
 might be depriv'd by the *Vassal*, if he
 took Care in his Disposition to reserve
 the Rents of the Lands to a possible
 and future Heir. And as the *Vassal*
 cannot transmit and alienate the *Few*
 by perpetual Tacks and Life-Rents,

From the Municipal Law. 8269

lest the Superior should be deprived of his just Advantages; so neither by this Clause can he possibly introduce this Delay, lest the Superior should want a Vassal, and the Dominion be attended with no Manner of Profit. Nor will the Subvassals of this future Heir, during this Dependence of the Fee, be permitted to enter and be acknowledged or invested by their Superior, and consequently the Feudal Rights which shall obtain among us will be very imperfect.

Tenthly, My Lord, These Words, (*who failing*) are equivalent, and may be resolved into this Clause (*Children not existing*), but the Clause, *not existing*, is only verified concerning those who are alive at the Time the Heritage falls; for Words of the present Time, such as these (*Not existing*) neither draw nor include (*a*), where we

(a) L. si ita ff. de annuis Legat.

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 276 The Sixth Pleading
 we are told that in Legacys the present
 Time ought always to be regarded, if
 some other Thing is not comprehen-
 ded by it: And therefore they ought
 not to be drawn to the future Time a-
 gainst their Nature; for a Quality ad-
 ded to a Verb, is always understood
 according to the Tense of the Verb^(a).
 Eleventhly, My Lord, In no Suc-
 cession can the Dominion be uncertain,
 or in the Clouds, as the Doctors speak,
 For Law, as well as Philosophy, abhors
 a vacuum; and therefore has order'd
 the lawful Owners to be acknow-
 ledg'd, that so Debtors might know
 to whom they may pay securely, and
 Creditors, from whom they may de-
 mand their own: And, in short, that
 every Thing may have a Master to
 maintain and preserve it. And this
 Interpreters think was enacted by L.
 ult. ff. Com. Prad. The last Words where-
 of

(a) Everard. Conf. V.

of are these: 'For altho' the Acts of the living are frequently delay'd and suspended, yet this does not obtain in the Deeds of deceased Persons. 'The Heritage (says Stockmannus (a), cannot be uncertain after the Death of the Testator; and consequently cannot appertain to any others than those who are already born (b). All which is confirm'd by Fusarius (c), and Everard (d), who expressly tell us, that he is look'd upon as lawfully call'd to the Succession, who is found to be such at the Time the Condition is fulfill'd, and that Person ought not to be regarded who either never existed, or else deceas'd before the Day of the Fidei Commis. came. For in all conditional Dispositions, the Qualifier

(a) Decis. 26. num. 27. (b) L. si est legatum, ff. de suis & legitim. L. cum ita §. fin. ff. de Legat. 2. §. proximus natus. de legit. Agnat. succell. (c) de Fidei Com. quest. 318. (d) Conf. V.

itions in the Heir ought to be in him
 at the Time the Condition is ac-
 complish'd, without any Regard to
 that which he might possibly be pos-
 sess'd of when he was invited to
 the *Heritage*. Hence it is, that *Pre-*
scriptions are introduc'd against the
 Principles of Law, lest the Propertys
 of Things should be uncertain: And,
 upon this Consideration also it is that
 the *Heritage* is never lost from a certain
 Day, nor untill one: But in such Cases
 the Defect of the Time is remov'd, and
 the *Institution* remains; and hence the
 Possession of the Heir and the Defunct
 is said to be continu'd without any
 Manner of Interruption. But none of
 these could be firmly establish'd, if so
 great a Distance were interpos'd by
 this Uncertainty; for the Dominion
 and Property must needs be doubtful,
 and the Possession of the Heir could
 not possibly be join'd to that of the
 Defunct

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Defunct, when there is no living Heir to continue this Possession. And if the Acts of deceas'd Persons cannot be suspended, we may safely conclude that a Substitution ought not to be delay'd. From all which Considerations, it sufficiently appears how much our Assertion is founded upon the Principles of Law, and how agreeable it is to the perpetual Strain and Tenor of it.

My Lord, Our Adversariys being sensible how much this univereal Consent of Doctors which is so plainly on our Side does incommode their Cause, find Fault with these Definitions of the Civil Law, as refin'd Subtletys that are of no Weight or Consequence: As if this antiquated Doctrine of the Schools should not defeat the sacred Delights and Destinacions of Testators, and ought not to be compared with them. For how dangerous and un-

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furd would it be, say they, to submit
 the Last Will of deceas'd Persons to
 the Subtletys of Lawyers; and by
 this Means to render them useless and
 insignificant. That he who is invited
 by the Defunct to the Succession in
 the last Place, should, according to
 these Lawyers, obtain the first. Nor
 can the Order of nominating Heirs be
 to any Purpose, since by this Means
 all Order would be intirely confound-
 ed. So that altho' there is a certain
 Method and Gradation invented of
 calling and nominating Heirs, that so
 dying Persons may have the Satisfac-
 tion to know what Heirs shall succeed
 them, and the Order in which they
 will do it; yet if these Subtletys are
 permitted to obtain among us, it will
 be impossible for a Man to know who
 shall be his Heir. And it will fre-
 quently happen that a Grand-child
 by one of our dearest Sons shall be re-

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mov'd from the Succession, that so one may enter Heir who is scarce related to the Defunct, because that Grand-child, whom the deceas'd Person principally regarded did not exist in that fatal and critical Moment wherein the Testator died; and so this near Relation, as if he were Thunder-struck, shall see his Hopes and Expectation unexpectedly defeated altho he was born, perhaps a very short Time after the Death of the Defunct; and be unhappily reduc'd to beg his Bread, while he shall have the Mortification to behold a plentiful Fortune, to which he has so just a Title, in the Hands of the remotest Heir, and of one who is hardly related to him. Besides, it might fall out that none of the Substitutes existing at the Time of the Testator's Death, the Estate would devolve to the King, as to the last Heir. And this Inconvenience they affirm to be more than

all that we have alledg'd, that These which seem to be in our Case, are of no Consideration, since they are merely accidental; and that nothing is more ordinary in Law, than that many Things daily come to pass, which somewhat incommode our Substitutions, but are not able to subvert and destroy them. Nor does the Inconveniency take off the Force of the Argument; for altho' such Hardships might probably determine them to be of our Opinion in a doubtful Case, yet we ought never to violate Laws, or Last Wills, when they are expressly declar'd. These general Considerations being premis'd, they return to our Arguments, this particular Answer to that Series of Inconveniencies which we have distributed into five Arguments: They answer, That the Judges can easily appoint a Governor to the

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the Goods of the deceased Person, who shall be capable of pursuing and defending Actions, of adjusting and taking Inspection of Accompts, and of managing Affairs: That even the Law itself, during this Uncertainty of Succession, may be adjudged to the Creditors; and the Goods of the deceased Debtor be affected by Declarators and other Actions which have been invented to this Purpose. Nor ought we to regard the Forfeiture, which arises from this Uncertainty; since this only happens accidentally and by Chance, and proceeds from the same Fountain of the Feudal Law with six hundred of the like Nature. Besides, Creditors are no more hurt by this than by Forfeitures, Escheats, Recognitions, and other Casualties, whereby the Fee, which in our Case only returns to the Exchequer for a short Time, in these is irrecoverably lost. And since the

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Gratification of Creditors does not hinder the Damages which are occasioned by Clauses that discharge Alienations and other resolute and irrevocable Conditions, whereby not only some casual Incomes and Advantages, but the Fee it self is intirely swallowed up and consum'd. Why should the Will of Testators be here inverted, which at least among their Heirs and Relations ought always to be accounted a Law. Especially since the Benevolence of our Sovereign to easily accommodate it self to that which is just and reasonable? And all these Inconveniencies can for the future be prevented by the Testator's nominating a Trustee, in whose Hands the yearly Revenues of the Estate may in the mean while be consign'd, which Depositary may serve for a Vassal, till such Time as a Real one shall exist, by

by which Means the Incomes of it will not appertain to the King.

They tell us that our Arguments drawn from a Succession without a Testament to that which is tailzied and expresse, are very insufficient, because when the Law by Words of the present Time, does purely invite Heirs to the Succession, we must not expect those that are yet to be born, who derive all their Right from the Nomination of the Defunct, who has neglected the Order of Law, that so he might chuse Heirs to himself. And this Nomination is so exactly regarded by the Law, that we find it expressly ordain'd, That as every Man disposes of his Estate, so the Right of it shall remain, And the Provision of Man excludes the Provision of the Law which does indeed assist those Persons who die without a Testament, but does not absolutely govern those who make their Testa-

Testaments. And hence it is, that at present, a Man if he pleases may disinherit his nearest Relation, and appoint Heirs till such a Day, or upon such a Condition. Of which we are presented with a fuller View, L. 3. § 69. ff. De Acquir. & Omitt. Hered. & L. 16. ff. De Legat. 1. Now altho' in the Civil Law the Institution of an Heir was very much restricted, yet they affirm that the present *Municipal* Laws of Nations have receded from that Subtlety of the *Roman* Law; and indulg'd dying Persons a full Dominion over their Goods. And here, as in a great many Cases of this Nature, they tell us that the Customs of our Country prevail over the Laws, having more Regard to Reason and Equity than to the refin'd Subtletys of the *Doctors*. Which plainly appears from *Vinnius*(a) & *Grotius*(b), where he

(a) Ad s. 9. Inst. de Hered. Instit. (b) Jus Batav. L. 2. C. 18. Num. 38.

informs us that these Subtleties are now gone into Desuetude, and a Testator is permitted to appoint an Heir upon a Condition; which if we take for granted there can be no manner of Doubt that an Heir may be designated till an uncertain Day; for in *Infamia* an undetermined Day is always accounted a Condition. *livio* *en* *hi* *fi*
 That this Expectation of a future Heir is not contrary to our present *Principles*, they contend by these Arguments. That altho' of old by the Law purely *Prædial*, a Man could not with the Consent of his Superior either leave the Fief at his Death in a Testament, or Alienate it among the Living; yet now that Feuds do not proceed from the bare Liberality of the Superior, Strangers can be appointed Heirs, upon a Condition, and for a certain Time, whereof an infinite number of Examples may be easily adduc'd; as

For
It must be

for Instance, if one resign'd his *Few* in Favour of the Heirs that were to be born of his Marriage; who failing, in Behalf of the Wife or Husband, who should prove the Survivor, the Provision would certainly be valid; and yet no Body doubts but this *Substitution* is made till an uncertain Day; for it is the most doubtful thing in the World, whether any Heirs shall arise from the Marriage, and which of the married Persons shall survive the other. And just so, if a Man should appoint any one of his Nephews to be his Heir, who should marry the Daughter of the *Testator*, and substitute the Sons he should beget; the *Destination* would be valid, altho it is uncertain whether any shall marry the *Testator's* Daughter, and who the particular Person shall be. So that we find Dominion and Succession must needs depend on an uncer-

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 uncertain Event. From all which
 Considerations, they conclude, that the
 Property of things can be doubtful
 and suspended; when, in the *Defunct's*
 Testament, this is expressly provided;
 and that that Rule does only obtain
 in the *Institutions* of the Law, and not
 in the Provisions of Man; as we are
 inform'd by *Peregrin*: Nor yet
 can Dominion be said to be uncertain,
 since when the Heir does not serve
 himself, the Heritage represents the
 Person of its deceas'd Owner, till such
 a Time as the future Heir enters on
 the Possession of it. And as soon as
 he enters, the Time of the Entry is
 brought back to the Death of the
Testator, and the Possession is continu-
 ed in his Person. By all which Con-
 siderations, your Lordships were so
 much mov'd when the same Question
 was debated before you, between
Bannantine of *Corhouse* and *Weir* of

Blackwood; and you had been constituted *Arbiters* in the Case that you prefer'd the future Heir to him, who was only alive at the Time of the *Testator's* Death. But, my Lord notwithstanding these Arguments I contend, That he ought always to be prefer'd, who is capable of succeeding to the Estate at the Time of the Death of the *Testator*; and that we ought not to expect a future and imaginary Heir, who is only supported by such *Popular* and common Principles of Law. For we are not always allow'd to dispose of our Goods in Prejudice of the Laws, and to the Disadvantage of a well-regulated Common-Wealth; nor can any Man hinder the Laws from taking Place in his Testament; and since they sufficiently indulge our just *Dispositions*, why should they also pardon your Errors and Mistakes? And the *Earl of Levin* could easily have pre-fer'd

fer'd the future Heir by nominating
a *Depository* or *Trustee*; nay we do
not deny but that if he had expressly
provided that the future Heir should
be expected, he would at this Time
infallibly be prefer'd. So that, My Lords, These specious
Pretences of Respect and Veneration
for the sacred Will of dying Persons,
do not at all concern us, since we
measure the doubtful Will of the De-
funct by his own Interest and Advan-
tage. For when the Testator who
was possess'd of a numerous Offspring,
and had all the Reason in the World
to hope they would continue to re-
present his Name to Posterity, out of
a just Care of his Friends and Rela-
tions, nominated that Random these
Substitutes, so far remov'd from him,
he cannot reasonably be suppos'd to
have had any other Design in View,
than that by this Means he might
give

The sixth Pleading

give them a convincing Proof of his Friendship and Affection. And since he has all along so carefully provided for himself and his Family, we cannot possibly imagine he would ever have behav'd so unaccountably as intirely to destroy it by the Expectation of the second Son of the Lord Chancellor, who was yet unborn; especially considering that his Interest was so well secur'd by putting him into a Capacity of succeeding to his Estate, in Case he was alive at the Time of the Testator's Death. And therefore since he was not born at that fatal Moment, there is no greater Injury done him than to one who is depriv'd of his Brother's Estate, by his Father's serving himself Heir, upon this Consideration that he was not alive, when he ought to have enter'd.

My Lord, The Supposition of a Curator to be given to the Goods of the
Defunct

Defunct, will not serve our Turn, and cannot possibly prevent the Inconveniencies which I have represented to your Lordship. For, as there is no absolute Necessity for it; and we ought not to have Recourse to unusual Remedies, as long as ordinary ones may be procur'd; so this *Curator* shall neither be capable of transacting, nor under any Necessity or Obligation of managing Affairs in such a Manner as is requisite in the present Case. And then no *Prescription* will run against the future Heir; nor can the *Curator* be imprison'd for the Debts of the *Defunct*. To remedy which Evils, we must necessarily invent new Stiles, and fall upon another Method than that of appointing a *Curator* to the Goods of the *Defunct*. Besides, the Inconveniencies, that arise from *Confiscation*, do still incommode us, which are prevented by the contrary Scheme,

Scheme. For neither the Nature of the Fee, nor the Liberality of the Prince can hinder a Forfeiture that continues for so many Years from hurting the Defunct. So that it would be the most unaccountable Piece of Madness imaginable for us to believe the Words of the Testator ought to be interpreted in such a Sense, as naturally infers Confiscation.

And why in doubtful Cases ought Successions to be expos'd to so dangerous and invincible Difficulties? Nor is our Case, in which all these Inconveniencys are so happily prevented by the Testator, to be compar'd with Forfeiture, Recognition, and other Casualty, which necessarily arise from the Nature of the Fee; nor with the open and express Will of the dying Person, in which either the Laws or the Defunct have commanded the future Heir to be expected.

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Let us therefore, *My Lord*, enquire into the Differences that are adduc'd between the *legal* and *provisional* Succession. And, at first View, we shall find the *provisional* one will admit of no Alteration. For since the *Provision* or *Tai zie* is at least a Kind of Succession, it must retain all these Qualities which flow from the *universal* Nature of Succession, except these only that are adjected to it by the Tenor of the *Provision* which only changes the Persons that are to succeed, but not the Method of succeeding. And therefore *Menoch.* (a) does excellently observe, "That Succession, by a Testament, admits of Interpretation from *intestate* Succession, and is regulated by it, insomuch that in a doubtful Case, those that are call'd in the Testament are suppos'd to be invited in the same Way and Order
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(a) Concil. 198. Num. 14.

‘they would have succeeded *ab intestato*. These Arguments, which require a present and living Heir in a legal Succession, that so the *Defunct* may not want one to manage his Affairs, nor the Creditors one to represent their deceas’d Debtor, have the same Force and Validity in the one Case as in the other. Nay, it is certain, he more carefully provides for his Family, who nominates many, lest he should want an Heir. We ought not to recede from the general Disposition of the Laws, unless there be an obvious Exception, which is plainly permitted by them; but no Law can be alledg’d, whereby a future *substitute* is to be expected; except in some Instances which no Way relate to the present Case. Where he who is yet unborn, is alive at the Time of the Death of the Testator, but exists in the Womb; in which Case, seeing it

cannot

cannot be said that an Heir is wanting, since in Law a *Posthumous* Child does always pass for one already born, when it may possibly conduce to his Advantage: It naturally follows that a *Posthumous* Child ought to be expected. And therefore in L. 17. ff. *De Vulg. & Pupil. substitut.* we find these Words; 'He also can be substituted to the Children of the Family, who is born after the Death of the Testator.

Now to whom the Heir was substituted, the Commentary declares; 'I have appointed my Son, who is yet in the Age of Pupillarity to be my Heir, and afterwards, thus order'd Matters, If any Son be born to me after the Death of the said Minor, whom I have instituted my Heir, let him succeed to the aforesaid Minor, and then I died, and afterward the Minor deceas'd also;

and by my Wife, who was big with Child, and alive at the Time of my Death I had a *Posthumous* Son. Now, to be sure, this *Posthumous* Child shall succeed to the Estate of his deceased Brother. And by 16. ff. De Leg. 1. this is expressly enacted concerning a *Posthumous* Son.

Altho' an Estate cannot possibly descend to a future Heir, because he is not capable of succeeding to it; yet a *Legacy* may be left unto him. For a *Legatar* is neither oblig'd to manage the Affairs, nor pay the Debts of the Defunct. And therefore it is not necessary, that when he ought to *perform* himself he be either alive or capable of succeeding. I acknowledge that in *Fidei Commissis*, the *Fiduciary* Heir can be nominated until a certain Day, and be expected, tho' yet unborn. For the *Fiduciary* Heir, whom the Defunct has intrusted with his Estate

does support the Property of it in his own Person, and, passing for the Direct Heir, effectually hinders the Dominion from being uncertain, and the Defunct from wanting an Heir. From whence Perez: to this Question 'Whether it be lawful for one to leave a Fidei Commiss. as he pleases, either purely, or upon a Condition, or from a certain Day? Returns this Answer, That in this Case the Testator is allow'd a free Choice, and that this makes an essential Difference between an Heritage and Fidei Commiss. because an Estate cannot be left directly from a certain Time. The Reason of which Difference seems to be this, 'That from the Institution of an Heir made either until or from a certain Time, it would follow that one might die, partly with a Testament, and in some Measure without one. But there is no Danger

ger of this in a *fiduciary* Heir; for he is not properly the Heir, but only supplies his Place, which are two different Things. So that if the *Defunct* had been willing to expect one that was yet to be born, he both could and ought to have interpos'd a *fiduciary* Heir, that so, during the Dependence of the Condition, he might represent the Heritage. By which Remedy, all the Absurdities and Inconveniencys, Adversarys have alledg'd, might be easily prevented: For if the *Testator* resolv'd to appoint any of his Brother's Children to be his Heir, who should marry his Daughter, and to *substitute* to him the Sons of that Marriage, he might easily commit the Heritage to the Care and Honesty of some faithful Friend, who would represent it, while the Condition depended and might bind and oblige him to restore the Estate to those Heirs,

Heirs, for whom it was provided, and to resign it in Favour of them, as soon as they should be capable of succeeding to it. And this is at present made use of by many of our Countrymen, as a necessary and lawful Remedy; the Event never failing to answer their Expectation. But since the *Defunct* has not in this Manner call'd his Successors, but only us'd these Words, (*who failing*) we may safely conclude he has invited 'em in that Order, which on such Occasions is usual and lawful. Nor should we in this Case consider what he ought to have done, but what he has actually perform'd. And the Dominion cannot be said to subsist, during the Dependence of the Condition; for if this were granted, a *Fiduciary* Heir would be very unnecessary, and the Rules, prescrib'd us by *Vinnius*, superfluous and useless. And because the *Empty Heritage* with
out

out an Heir is not capable of managing the Affairs of the *Defunct*, therefore the Laws require either a *direct* or *Fiduciary* Heir. And in our Law the empty *Heritage* is oppos'd to the Heir and Master; so far is it from supplying their Place.

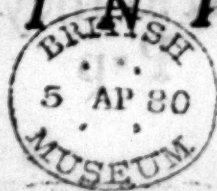
My Lord, As to that vicious Circle, whereby our Adversarys contend that this Absurdity will happen, that at this Time the second Son of the Lord *Melvil* shall succeed and be serv'd Heir, and afterwards upon the Birth and Existence of the Lord *Chancellor's* second Son, that first Heir will be depriv'd of the Estate, and then the Son of the Lord *Chancellor*, dying without Children, the Lord *Melwill* shall be restor'd to his Fortune; and thus the *fluctuating* and uncertain *Heritage* shall eternally go round in a ridiculous Circle: To this Difficulty, I say, it may be answer'd, that the *Heritage* apper-

appertains to him alone, who had the good Fortune to exist at the Time of the Testator's Death, and that there is no more Place for a future Heir, nor can he reasonably be expected; *since he who is once Heir, is always so.* Nor can the first Service be reduc'd upon the Existence of the future Heir, unless the Defunct had expressly provided, that this Fiduciary Heir should give Place to the Substitute. In which Case no greater Absurdity shall happen, than daily falls out in the Resignations of Fiduciary Heirs. Nor, My Lord, does the Case of Blackwood do us any Prejudice; for there the presum'd Will of the Defunct induc'd the Judges to determine the Affair in Favour of his Grand-Child; and there Lordships desir'd the Parties, and the living Heir (not the future Substitute) to refer the Matter to their Arbitration, that so they might not be

too religiously bound by the Rigour of the Law. And this plainly shews they were sensible that such a Case as ours, ought certainly, according to the constant Tenor of the Laws to be determin'd in Favour of that Grand-Child by his Daughter, who existed at the Time of the Death of the *Testator*.

So that in *that* Case there was a living Heir ; in this there is one who is yet unborn : There the Sisters Son of the *Defunct* pursu'd a Stranger ; here a Stranger contends with a Sister's Son : There the Will of the *Testator* was clear and manifest, here it is doubtful and uncertain : In their Case there was one of the *Substitutes* alive to represent the *Defunct*, and pay his Debts ; here there are none : There, *Arbiters* gave a *Decreet*, according to Equity ; here *Judges* must determine the Matter according to Law.

F I N I S.



too religiously bound by the Rigour of the Law. And this plainly shews they were sensible that such a Case as ours, ought certainly, according to the constant Tenor of the Laws to be determin'd in Favour of that Grand-Child by his Daughter, who existed at the Time of the Death of the Testator. So that in that Case there was a living Heir; in this there is one who is yet unborn: There the Sisters Son of the Defunct purs'd a Stranger; here a Stranger contends with a Sister's Son: There the Will of the Testator was clear and manifest, here it is doubtful and uncertain: In their Case there was one of the Substitutes alive to represent the Defunct, and pay his Debts; here there are none: There, Arbiters gave a Decree, according to Equity; here Judges must determine the Matter according to Law.

F I N I S.